

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/STOP PRESS: THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010

## **BANKRUPTCY AND INDIVIDUAL INSOLVENCY (**

### **STOP PRESS:**

The Third Parties (Rights against Insurers) Act 2010 makes provision about the rights of third parties against insurers of liabilities to third parties in the case where the insured is insolvent. The Act received the royal assent on 25 March 2010 and comes into force on a day or days to be appointed. For details of commencement, see the COMMENCEMENT OF STATUTES table in the *Current Service* Noter-up booklet.

Section 1 sets out when a statutory transfer of rights occurs and specifies when the third party may enforce those rights. A new mechanism is introduced by s 2 to enable a third party to bring proceedings against an insurer without first establishing the fact and amount of the insured's liability. Section 3 deals with Scotland. Section 4 lists the circumstances in which an individual is a 'relevant person' for the purposes of the 2010 Act. By virtue of s 5, a statutory transfer from a deceased insured takes place only where the debtor dies insolvent subject to a liability against which he is insured. Section 6 lists the circumstances in which a body corporate or an unincorporated body is a 'relevant person' for the purposes of the 2010 Act. Section 7 deals with Scotland. Under s 8, a third party does not receive a right to recover from the insurer any amounts in excess of the insured's liability. By virtue of s 9, the rights transferred to the third party are subject to all of the defences which the insurer could use against the insured, but for three specified exceptions, which prevent an insurer from defeating a third party's claim by relying on certain technical defences, based on conditions in the insurance contract. The insurer's rights to deduct money owed to it by the insured from the monies payable to the third party is preserved by s 10. Section 11 introduces Sch 1, which confers on the third party rights to obtain information about the insurance policy. Section 12 sets out rules governing when an action to enforce rights transferred by the 2010 Act will be time-barred. Section 13 sets out what is to happen in cases in which the third party is domiciled in one part of the United Kingdom and the insurer is domiciled in another. Section 14 sets out the effect of the statutory transfer on the third party's rights against the insured. By virtue of s 15, the 2010 Act does not apply where the liability incurred referred to in s 1(1) is itself a liability incurred by the insurer under a contract of insurance. By virtue of s 16, a third party will be able to make a direct claim against an insurer even if the insurance covered liabilities voluntarily-incurred by the insured. An insurance contract is prevented by s 17 from being drafted so as to nullify the effect of the 2010 Act. By virtue of s 18, the 2010 Act will apply irrespective of whether the case has any foreign elements. Section 19 gives the Secretary of State a power by order to amend ss 4, 5 or 6 to take account of Northern Ireland legislation. Section 20 gives effect to Sch 2, which replaces references to the Third Parties (Rights against Insurers) Act 1930 in other legislation with references to the 2010 Act, Sch 3, which sets out transitional provisions, and Sch 4, which makes various repeals and revocations. Section 21 deals with the short title, commencement and extent.

### ***Amendments, repeals and revocations***

Subscribers should note that the list below mentions repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of

the in-force dates of the provisions of the Act. This information may also be found in the COMMENCEMENT OF STATUTES table in the *Current Service* Noter up booklet. Please also note that these lists are not exhaustive.

Specific provisions of a number of Acts are amended or repealed. These include: Third Parties (Rights Against Insurers) Act 1930; Insolvency Act 1985 Sch 8 para 7; Insolvency Act 1986 Sch 14; Road Traffic Act 1988 s 153.

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## **1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS**

### **(1) BANKRUPTCY AND INDIVIDUAL INSOLVENCY PROCEEDINGS; INTRODUCTION**

#### **(i) In general**

##### **1. Insolvency procedures.**

There are two types of procedure under the Insolvency Act 1986 which govern the administration of the affairs of insolvent individuals:

- 1 (1) voluntary arrangements under Part VIII of the 1986 Act<sup>1</sup> which contains provisions which apply when a proposal is made by a debtor for a composition in satisfaction of his debts or for a scheme of arrangement of his affairs; and
- 2 (2) bankruptcy under Part IX of the 1986 Act<sup>2</sup> which contains provisions relating to the bankruptcy of an individual.

The persons appointed to administer the affairs of the debtor in any such proceedings, that is to say supervisors of voluntary arrangements under Part VIII of the 1986 Act, interim receivers and trustees in bankruptcy, must be qualified to act as insolvency practitioners in relation to the debtor<sup>3</sup>.

1 le under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq post.

2 le ibid Pt IX (ss 264-371) (as amended): see para 124 et seq post.

3 See ibid ss 388(2), 389(1); and para 43 post. The official receiver is not required to be so qualified: see s 389(2) (as amended); and para 43 post. As to insolvency practitioners and their qualification see para 42 et seq post.

## **UPDATE**

### **1-17 Bankruptcy and individual insolvency proceedings; introduction**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(1) BANKRUPTCY AND INDIVIDUAL INSOLVENCY PROCEEDINGS; INTRODUCTION/(i) In general/2. Application of the statutory provisions.

## 2. Application of the statutory provisions.

The statutory provisions relating to the insolvency proceedings previously mentioned<sup>1</sup> are for the most part contained in the Insolvency Act 1986<sup>2</sup> which came into force on 29 December 1986<sup>3</sup> and in the Insolvency Act 2000<sup>4</sup>. The practice in such insolvency proceedings, so far as not laid down by those Acts, is regulated by rules, regulations and orders made under the Insolvency Act 1986<sup>5</sup> and by Practice Directions<sup>6</sup>.

Unless the contrary intention appears, the provisions of the Insolvency Act 1986 with respect to bankruptcy apply where the bankruptcy proceedings commenced on or after 29 December 1986<sup>7</sup>.

Subject to certain exceptions<sup>8</sup>, nothing in the Insolvency Act 1986 relating to individual insolvency extends to Northern Ireland<sup>9</sup>.

Her Majesty may, by Order in Council, direct that such of the provisions of the Insolvency Act 1986 as are specified in the Order, being provisions formerly contained in the Insolvency Act 1985, are to extend to any of the Channel Islands or any colony with such modifications as may be so specified<sup>10</sup>.

1 See para 1 ante.

2 See the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended). Parts I-VII (ss 1-251) (as amended) contain provisions relating to company insolvency: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 1 et seq. See also Pts XII-XVIII (ss 386-436) (as amended) which contain provisions bearing on both company and individual insolvency; and para 3 et seq post.

3 Ibid s 443; Insolvency Act 1985 (Commencement No 5) Order 1986, SI 1986/1924, art 3. The provisions relating to voluntary arrangements under the Insolvency Act 1986 Pt VIII (ss 252-263) apply to all such proceedings commenced on or after 29 December 1986. Details of the coming into effect of the specific provisions and any transitional provisions and savings relating to bankruptcy and insolvency practitioners and their qualification are considered with the relative statutory provisions.

The general transitional provisions and savings contained in the Insolvency Act 1986 are as follows (references to 'the former enactments' being to so much of the Companies Act 1985 as is repealed and replaced by the Insolvency Act 1986 (see s 439(1), Sch 13), the Insolvency Act 1985 (see s 235, Sch 10), and the other enactments repealed by the Insolvency Act 1986 (see s 438, Sch 12) (s 437, Sch 11 para 22):

- 1 (1) so far as anything done or treated as done under or for the purposes of any provision of the former enactments could have been done under or for the purposes of the corresponding provision of the Insolvency Act 1986, it is not invalidated by the repeal of that provision but has effect as if done under or for the purposes of the corresponding provision; and any order, regulation, rule or other instrument made or having effect under any provision of the former enactments is, in so far as its effect is preserved by these provisions, to be treated for all purposes as made and having effect under the corresponding provision (Sch 11 para 23);
- 2 (2) where any period of time specified in a provision of the former enactments is current immediately before 29 December 1986, the Insolvency Act 1986 has effect as if the corresponding provision had been in force when the period began to run; and, without prejudice to the above provisions, any period of time so specified and current is deemed for the purposes of the Insolvency Act 1986:
  1. (a) to run from the date or event from which it was running immediately before 29 December 1986; and

- 1
2. (b) to expire, subject to any provision of the Insolvency Act 1986 for its extension, whenever it would have expired if the Insolvency Act 1986 had not been passed;
- 2
- 3 and any rights, priorities, liabilities, reliefs, obligations, requirements, powers, duties or exemptions dependent on the beginning, duration or end of such a period as is mentioned supra are to be under the Insolvency Act 1986 as they were or would have been under the former enactments (Sch 11 para 24);
- 4 (3) where, in any provision of the Insolvency Act 1986, there is a reference to another such provision, and the first-mentioned provision operates, or is capable of operating, in relation to things done or omitted, or events occurring or not occurring, in the past, including, in particular, past acts of compliance with any enactment, failures of compliance, contraventions, offences and convictions of offences, the reference to the other provision is to be read as including a reference to the corresponding provision of the former enactments (Sch 11 para 25);
- 5 (4) offences committed before 29 December 1986 under any provision of the former enactments may, notwithstanding any repeal by the Insolvency Act 1986, be prosecuted and punished after that date as if the Insolvency Act 1986 had not been passed (Sch 11 para 26(1));
- 6 (5) a contravention of any provision of the former enactments committed before 29 December 1986 may not be visited with any severer punishment under or by virtue of the Insolvency Act 1986 than would have been applicable under that provision at the time of the contravention; but, where an offence for the continuance of which a penalty was provided has been committed under any provision of the former enactments, proceedings may be taken under the Insolvency Act 1986 in respect of the continuance of the offence on and after 29 December 1986 in the like manner as if the offence had been committed under the corresponding provision of the Insolvency Act 1986 (Sch 11 para 26(2));
- 7 (6) a reference in any enactment, instrument or document, whether express or implied, and in whatever phraseology, to a provision of the former enactments, including the corresponding provision of any yet earlier enactment, is to be read, where necessary to retain for the enactment, instrument or document, the same force and effect as it would have had but for the passing of the Insolvency Act 1986, as, or as including, a reference to the corresponding provision by which it is replaced in the Insolvency Act 1986 (Sch 11 para 27(1));
- 8 (7) the generality of the provisions in head (6) supra is not affected by any specific conversion of references made by the Insolvency Act 1986 nor by the inclusion in any provision of that Act of a reference, whether express or implied, and in whatever phraseology, to the provision of the former enactments corresponding to that provision, or to a provision of the former enactments which is replaced by a corresponding provision of that Act (Sch 11 para 27(2));
- 9 (8) nothing in the provisions contained in heads (1)-(7) supra is to be taken as prejudicing the Interpretation Act 1978 ss 16, 17 (savings from, and effect of, repeals: see STATUTES vol 44(1) (Reissue) paras 1303, 1306 et seq) (Insolvency Act 1986 Sch 11 para 29).

The Insolvency Rules 1986, SI 1986/1925 (as amended) apply to bankruptcy proceedings commenced before 29 December 1986 to which provisions of the Insolvency Act 1986 are applied by Sch 11, to the extent necessary to give effect to those provisions: Insolvency Rules 1986, SI 1986/1925, r 13.14(2).

4 The Insolvency Act 2000 ss 3, 4, 12-14, Sch 3 contain provisions relating to personal insolvency; ss 1, 2, 9-11, Schs 1, 2 contain provisions relating to company insolvency; and ss 5-8, Sch 4 contain provisions relating to the disqualification of company directors.

Section 14 (see para 729 post) came into force on 30 November 2000 (see s 16(2)); ss 5-11, s 12 (see paras 823, 833 post), s 13 (see para 753 post), Sch 4 and s 15(1), Sch 5 (in part) came into force on 2 April 2001 (see s 16(1), (3); the Insolvency Act 2000 (Commencement No 1 and Transitional Provisions) Order 2001, SI 2001/766, art 2(1)). At the date at which this volume states the law the Insolvency Act 2000 ss 1-4 had not yet been brought into force. As to the prospective effect of the Insolvency Act 2000 ss 3, 4, Sch 3 see paras 43 note 4, 44 note 2, 45, 81 note 6, 82, 83 notes 5, 8, 84 note 13, 85 note 2, 86 notes 3, 9, 89, 95 note 3, 96 note 5, 97 note 9, 100 note 6, 107 note 6, 108 note 4, 111 note 2, 117, 119 notes 4, 11, 122 note 4, 577 note 7, 686 note 3 post.

5 See the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952; the Insolvency Practitioners (Recognised Professional Bodies) Order 1986, SI 1986/1764; the Insolvency Rules 1986, SI 1986/1925 (amended by SI 1987/1919; SI 1989/397; SI 1991/495; SI 1993/602; SI 1995/586; SI 1998/1129; SI 1999/359; SI 1999/1022; SI 2001/763; SI 2001/1149); the Insolvency Proceedings (Monetary Limits) Order 1986,

SI 1986/1996; the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999; the Insolvency (Amendment of Subordinate Legislation) Order 1986, SI 1986/2001 (amended by SI 1986/2245; SI 1987/1398); the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, SI 1986/2123; the Insolvency Act (Guernsey) Order 1989, SI 1989/2409; the Insolvency Practitioners Regulations 1990, SI 1990/439 (amended by SI 1993/221); the Insolvent Partnerships Order 1994, SI 1994/2421 (amended by SI 1996/1308; SI 2001/767; SI 2001/3649); the Insolvency Regulations 1994, SI 1994/2507 (amended by SI 2000/485; SI 2001/762; SI 2001/3649); the Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386; the Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996, SI 1996/253; the Co-operation of Insolvency Courts (Designation of Relevant Country) Order 1998, SI 1998/2766.

As to fees see the Insolvency Fees Order 1986, SI 1986/2030 (amended by SI 1988/95; SI 1991/496; SI 1992/34; SI 1994/2541; SI 2001/761); the Department of Trade and Industry (Fees) Order 1988, SI 1988/93 (amended by SI 1990/1473; SI 1995/1294; SI 2001/3649); the Supreme Court Fees Order 1999, SI 1999/687 (amended by SI 1999/2569; SI 2000/641; SI 2000/937; SI 2000/1544; SI 2000/2382; SI 2002/222); the County Court Fees Order 1999, SI 1999/689 (amended by SI 1999/2548; SI 2000/639; SI 2000/939; SI 2000/1546; SI 2000/2310; SI 2001/1385; SI 2002/223); and para 816 post.

6 *Practice Direction-Insolvency Proceedings* Pts 1-3 (paras 1-16) came into effect on 26 April 1999 and replaced all previous Practice Notes and Practice Directions relating to insolvency proceedings (para 1.2); and Pt 4 (para 17) (appeals) came into effect on 2 May 2000 (para 17.1). It applies to practice and procedure in insolvency proceedings both in the High Court and in a county court. As to the status of Practice Directions see CIVIL PROCEDURE vol 11 (2009) PARA 12. In the Insolvency Rules 1986, SI 1986/1925 (as amended) 'Practice Direction' means a direction as to the practice and procedure of any court within the scope of the Civil Procedure Rules 1998, SI 1998/3132 (as amended): Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.13(6) (substituted by SI 1999/1022).

7 Subject to the provisions mentioned infra, so much of the Insolvency Act 1986 as replaces the Insolvency Act 1985 Pt III (ss 110-211) (repealed) does not apply in relation to any case in which a petition in bankruptcy was presented, or a receiving order or adjudication in bankruptcy was made before 29 December 1986: Insolvency Act 1986 Sch 11 para 10(1). In relation to any such case as is mentioned supra, the enactments specified in the Insolvency Act 1985 s 235(1), Sch 8, so far as they relate to bankruptcy, and those specified in s 235(3), Sch 10 Pts III, IV, so far as they so relate, have effect without the amendments and repeals there specified: Insolvency Act 1986 Sch 11 para 10(2). Where any subordinate legislation made under an enactment referred to in Sch 11 para 10(2) is in force immediately before 29 December 1986, that subordinate legislation continues to have effect on and after that day in relation to any such case as is mentioned in Sch 11 para 10(1): Sch 11 para 10(3). For these purposes, except in so far as the context otherwise requires, 'subordinate legislation' has the same meaning as in the Interpretation Act 1978 (see STATUTES vol 44(1) (Reissue) para 1381): Insolvency Act 1986 s 436.

In relation to any such case as is mentioned in Sch 11 para 10(1), the references in any enactment or subordinate legislation to a petition, order or other matter which is provided for under the Bankruptcy Act 1914 (repealed) and corresponds to a petition, order or other matter provided for under provisions of the Insolvency Act 1986 replacing the Insolvency Act 1985 Pt III (ss 110-211) continue on and after 29 December 1986 to have effect as references to the petition, order or other matter provided for by the Bankruptcy Act 1914 (repealed); but otherwise those references have effect on and after 29 December 1986 as references to the petition, order or other matter provided for by those provisions of the Insolvency Act 1986: Sch 11 para 11(1). Without prejudice to Sch 11 para 11(1), in determining for the purpose of s 279 (period of bankruptcy: see para 629 et seq post) or Sch 11 para 13 (see para 629 note 5 post) whether any person was an undischarged bankrupt at a time before 29 December 1986, an adjudication in bankruptcy and an annulment of a bankruptcy under the Bankruptcy Act 1914 (repealed) are to be taken into account in the same way respectively as a bankruptcy order under the provisions of the Insolvency Act 1986 replacing the Insolvency Act 1985 Pt III (ss 110-211) (repealed) and the annulment under the Insolvency Act 1986 s 282 (see para 610 et seq post) of such an order: Sch 11 para 11(2).

The provisions of Sch 11 paras 10-18 are without prejudice to the powers conferred by the Insolvency Act 1986 under which rules under s 412 (see para 753 post) may make transitional provisions in connection with the coming into force of those rules; and such provisions may apply those rules in relation to a bankruptcy notwithstanding that it arose from a petition presented before either the coming into force of the rules or 29 December 1986; and rules under s 412 may provide for such notices served before 29 December 1986 as may be prescribed to be treated for the purposes of the Insolvency Act 1986 as statutory demands served under s 268 (see para 127 post): Sch 11 para 19(1), (2).

Transactions entered into before 29 December 1986 have effect on and after that day as if references to acts of bankruptcy in the provisions for giving effect to those transactions continued to be references to acts of bankruptcy within the meaning of the Bankruptcy Act 1914 (repealed), but as if such acts included failure to comply with a statutory demand served under the Insolvency Act 1986 s 268: Sch 11 para 12.

8 The following provisions of the Insolvency Act 1986 relating to individual insolvency extend to Northern Ireland: s 426 (as amended) (see para 728 post); s 427 (as amended) (see para 697 post); s 428(3) (as

amended) (see para 46 post); s 439 and Sch 14 (in so far as they relate to enactments which extend to Northern Ireland); s 441(1).

9 Ibid s 441(2).

10 Ibid s 442. In exercise of the power so conferred Her Majesty made the Insolvency Act 1986 (Guernsey) Order 1989, SI 1989/2409, which came into force on 1 February 1990: art 1.

## UPDATE

### 1-17 Bankruptcy and individual insolvency proceedings; introduction

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## 2 Application of the statutory provisions

NOTE 3--Insolvency Act 1986 s 437, Sch 11 amended: SI 2009/1941.

NOTE 4--Insolvency Act 2000 s 1 in force 11 May 2001 for certain purposes (SI 2001/1751) and 1 January 2003 for remaining purposes: SI 2002/2711. 2000 Act ss 2-4 in force 1 January 2003: SI 2002/2711.

NOTE 5--SI 1986/1925 further amended: SI 2001/3649, SI 2002/1307, SI 2002/2712, SI 2003/1730, SI 2007/1974, SI 2008/737, SI 2009/642, SI 2009/2472, SI 2010/686 (see below). SI 1986/1996 amended: SI 2004/547, SI 2009/465. SI 1990/439 (as amended) replaced: Insolvency Practitioners Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081). SI 1994/2421 further amended: SI 2002/1308. SI 1994/2507 further amended: SI 2003/1633, SI 2004/472, SI 2005/512, SI 2007/3224, SI 2008/670, SI 2009/482, SI 2009/2748.

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. In particular, throughout SI 1986/1925, the word 'fit' is substituted with the word 'just', the word 'leave' is substituted with the word 'permission', and the word 'sign' (and paradigmatic expressions) is substituted with the word 'authenticate' (and equivalent paradigmatic expressions). References to affidavits are replaced with references to witness statements, statements of truth, statements of concurrence and certificates of service, as appropriate, and such statements are 'made' rather than 'sworn' ('witness statement', 'statement of truth' and 'certificate of service' are defined in r 13.13). Most shorter time limits are expressed in the number of business days, so that a reference to 'seven days' is now a reference to 'five business days', and certain time limits of 21 days or over are reduced and other time limits are varied. Other terminological changes include references a 'convener' of a meeting being substituted by a 'nominee', 'deponents' being substituted by 'nominated persons', an 'ex parte hearing' being substituted by a 'hearing without notice to any other party', 'exhibited' being substituted by 'attached', 'give' being substituted by 'send or give copies', 'inland revenue' being substituted by 'HM Revenue and Customs', 'insolvency practitioner' and 'responsible insolvency practitioner' being substituted by 'office-holder' (defined in new r 13.9A), 'plaintiff' being substituted by 'claimant', and 'a winding up' being substituted by 'winding-up proceedings' (definition added in r 13.13).

SI 1986/2030 replaced: Insolvency Proceedings (Fees) Order 2004, SI 2004/593 (amended by SI 2005/544, SI 2006/561, SI 2007/521, SI 2008/714, SI 2009/645). SI 1999/687, SI 1999/689 replaced: Civil Proceedings Fees Order 2008, SI 2008/1053 (amended by SI 2008/2853, SI 2009/1498).

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### 3. Crown application.

The provisions of the Insolvency Act 1986 relating to individual insolvency<sup>1</sup> which derive from the Insolvency Act 1985<sup>2</sup> bind the Crown so far as affecting or relating to the following matters:

- 3 (1) remedies against, or against the property of, companies or individuals<sup>3</sup>;
- 4 (2) priorities of debts<sup>4</sup>;
- 5 (3) transactions at an undervalue or preferences<sup>5</sup>;
- 6 (4) voluntary arrangements approved under Part VIII of the Insolvency Act 1986<sup>6</sup>;
- and
- 7 (5) discharge from bankruptcy<sup>7</sup>.

1 As to the provisions referred to see para 2 note 2 ante.

2 Ie the Insolvency Act 1985 (repealed save for certain amending provisions): see the Insolvency Act 1986 s 438, Sch 12.

3 Orders made under the Insolvency Act 1986 s 236 (inquiry into company's dealings etc: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 679) bind the Crown: *Soden v Burns, R v Secretary of State for Trade and Industry, ex p Soden* [1996] 3 All ER 967, [1996] 1 WLR 1512. It is apprehended that the position is the same in respect of the Insolvency Act 1986 s 366 (inquiry into bankrupt's dealings and property): see para 307 post.

4 See para 573 et seq post.

5 See para 653 et seq post.

6 Ie under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq post.

7 Ibid s 434. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 434 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

As to the issue of statutory demands by the Crown see para 157 note 2 post; as to the presentation of petitions by the Crown see para 160 post; as to discharge from bankruptcy see para 629 et seq post; and as to the application to the Crown of the provisions of the Insolvency Act 1986 relating to company insolvency see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 6.

## UPDATE

### 1-17 Bankruptcy and individual insolvency proceedings; introduction

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#### **4. Punishment of offences.**

In many cases the Insolvency Act 1986 and the Insolvency Rules 1986 impose either imprisonment or a fine, or both, on individuals who fail to comply with the statutory requirements. Schedule 10 to the Insolvency Act 1986 and Schedule 5 to the Insolvency Rules 1986 have effect with respect to the way in which such offences are punishable on conviction<sup>1</sup>.

In relation to an offence under a provision of the Insolvency Act 1986 or the Insolvency Rules 1986 specified in the first column of the appropriate Schedule (the general nature of the offence being described in the second column), the third column shows whether the offence is punishable on conviction on indictment, or on summary conviction, or either in the one way or the other<sup>2</sup>.

The fourth column of the appropriate Schedule shows, in relation to an offence, the maximum punishment by way of fine or imprisonment under the appropriate statutory provision which may be imposed on a person convicted of the offence in the way specified in relation to it in the third column, that is to say on indictment or summarily, a reference to a period of years or months being to a term of imprisonment of that duration<sup>3</sup>.

The fifth column shows, in relation to an offence for which there is an entry in that column, that a person convicted of the offence after continued contravention is liable to a daily default fine, that is to say, he is liable on a second or subsequent summary conviction of the offence to the fine specified in that column for each day on which the contravention is continued, instead of the penalty specified for the offence in the fourth column of the appropriate Schedule<sup>4</sup>.

With reference to a fine or penalty on summary conviction for an offence, 'the statutory maximum' means the prescribed sum<sup>5</sup> under the Magistrates' Courts Act 1980<sup>6</sup>.

1 Insolvency Act 1986 s 430(1); Insolvency Rules 1986, SI 1986/1925, r 12.21(1).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 430 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

2 Insolvency Act 1986 s 430(2); Insolvency Rules 1986, SI 1986/1925, r 12.21(2).

3 Insolvency Act 1986 s 430(3); Insolvency Rules 1986, SI 1986/1925, r 12.21(3).

4 Insolvency Act 1986 s 430(4); Insolvency Rules 1986, SI 1986/1925, r 12.21(4).

5 ie within the meaning of the Magistrates' Courts Act 1980 s 32 (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. The present maximum is £5,000: see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)(c)).

6 Interpretation Act 1978 s 5, Sch 1 (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58(b)).

### **UPDATE**

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## 5. Meaning of 'associate'.

For the purposes of the Insolvency Act 1986, any question whether a person is an associate of another person is to be determined in accordance with the following provisions<sup>1</sup>.

A person is an associate of an individual if that person is the individual's husband or wife, or is a relative<sup>2</sup>, or the husband or wife of a relative, of the individual or of the individual's husband or wife<sup>3</sup>.

A person is an associate of any person with whom he is in partnership, and of the husband or wife or a relative of any individual with whom he is in partnership; and a Scottish firm is an associate of any person who is a member of the firm<sup>4</sup>.

A person is an associate of any person whom he employs or by whom he is employed<sup>5</sup>.

A person in his capacity as trustee of a trust other than a trust arising under the Insolvency Act 1986<sup>6</sup>, or a pension scheme or an employees' share scheme<sup>7</sup>, is an associate of another person if the beneficiaries of the trust include, or the terms of the trust confer a power that may be exercised for the benefit of, that other person or an associate of that other person<sup>8</sup>.

A company<sup>9</sup> is an associate of another company if:

- 8 (1) the same person has control<sup>10</sup> of both, or a person has control of one and persons who are his associates, or he and other persons who are his associates, have control of the other; or
- 9 (2) a group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating, in one or more cases, a member of either group as replaced by a person of whom he is an associate<sup>11</sup>.

A company is an associate of another person if that person has control of it or if that person and persons who are his associates together have control of it<sup>12</sup>.

1 Insolvency Act 1986 ss 435(1), 436. Any provision in s 435 that a person is an associate of another person is to be taken to mean that they are associates of each other: s 435(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 435 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

2 For these purposes, a person is a relative of an individual if he is that individual's brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant, treating any relationship of the half blood as a relationship of the whole blood and the stepchild or adopted child of any person as his child, and an illegitimate child as the legitimate child of his mother and reputed father; and references in the Insolvency Act 1986 s 435 to a husband or wife include a former husband or wife and a reputed husband or wife: s 435(8).

3 Ibid s 435(2).

4 Ibid s 435(3).

5 Ibid s 435(4). For these purposes, any director or other officer of a company is to be treated as employed by that company: s 435(9).

6 Ie under ibid Pts VIII-XI (ss 252-385) (as amended): see para 81 et seq post.

7 Ie within the meaning of the Companies Act 1985 s 743: see COMPANIES vol 14 (2009) PARA 169.

8 Insolvency Act 1986 s 435(5). The exception in favour of trustees of a pension scheme applies even where all the beneficiaries of the scheme constitute a majority of trustees: *Re Thirty-Eight Building Ltd* [1999] 1 BCLC 416, [2000] BCC 260; *Re Thirty-Eight Building Ltd (in liquidation) (No 2)*, *Simms v Saunders* [2000] 1 BCLC 201, sub nom *Re Thirty-Eight Building Ltd* [2000] BCC 422.

9 For these purposes, 'company' includes any body corporate, whether incorporated in Great Britain or elsewhere; and references to directors and other officers of a company and to voting power at any general meeting of a company have effect with any necessary modifications: Insolvency Act 1986 s 435(11). For the meaning of 'body corporate' see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 5.

10 For these purposes, a person is to be taken as having control of a company if: (1) the directors of the company or of another company which has control of it, or any of them, are accustomed to act in accordance with his directions or instructions; or (2) he is entitled to exercise, or control the exercise of, one-third or more of the voting power at any general meeting of the company or of another company which has control of it; and, where two or more persons together satisfy either of the above conditions, they are to be taken as having control of the company: ibid s 435(10).

11 Ibid s 435(6).

12 Ibid s 435(7).

## UPDATE

### 1-17 Bankruptcy and individual insolvency proceedings; introduction

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## 5 Meaning of 'associate'

TEXT AND NOTES 1-4--References to husband or wife are also to civil partner: 1986 Act s 435(2) substituted, s 435(3) amended by the Civil Partnership Act 2004 Sch 27 para 122).

NOTE 2--References to a civil partner include a former civil partner and a reputed civil partner: 1986 Act s 435(8) (amended by the Civil Partnership Act 2004 (Overseas Relationships and Consequential, etc Amendments) Order 2005, SI 2005/3129).

NOTES 6-8--Insolvency Act 1986 s 435(5) amended: SI 2009/1941.

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## (ii) Bankruptcy Courts

### 6. Courts having jurisdiction.

For the purposes of the provisions of the Insolvency Act 1986 relating to the insolvency or bankruptcy of individuals<sup>1</sup>, the High Court and the county courts have jurisdiction throughout England and Wales<sup>2</sup>; and a county court has, in addition to its ordinary jurisdiction, all the powers and jurisdiction of the High Court, and the orders of the court may be enforced accordingly in the prescribed manner<sup>3</sup>.

For the purposes of the provisions of the Insolvency Act 1986 relating to the insolvency or bankruptcy of individuals<sup>4</sup>, jurisdiction is exercised:

- 10 (1) by the High Court in relation to the proceedings which, in accordance with the Insolvency Rules 1986<sup>5</sup>, are allocated to the London insolvency district<sup>6</sup>; and
- 11 (2) by each county court<sup>7</sup> in relation to the proceedings which are so allocated to the insolvency district of that court<sup>8</sup>.

1 For the purposes of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

2 Ibid s 373(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 373 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

3 Insolvency Act 1986 s 373(2).

4 See note 1 supra.

5 For the Insolvency Rules 1986, SI 1986/1925 (as amended).

6 For the meaning of 'the London insolvency district' see para 7 note 1 post.

7 As to the county courts having jurisdiction see para 7 post.

8 Insolvency Act 1986 s 373(3). Section 373(3) is without prejudice to the transfer of proceedings from one court to another in the manner prescribed by the Insolvency Rules 1986, SI 1986/1925 (as amended) (see para 734 post); and nothing in the Insolvency Act 1986 s 373(3) invalidates any proceedings on the grounds that they were initiated or continued in the wrong court: s 373(4).

As to the appropriate courts in which bankruptcy proceedings are to be commenced see further para 160 (creditor's petition) and para 188 (debtor's petition) post.

In the Insolvency Act 1986 'the court', in relation to any matter, means the court to which, in accordance with s 373 (see supra) and the Insolvency Rules 1986, SI 1986/1925 (as amended), proceedings with respect to that matter are allocated or transferred: Insolvency Act 1986 s 385(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 385 (as amended) applies, with the modification that, at the end of the definition of 'the court', there are to be added the words 'and subject thereto "the court" means the court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his death': Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 33.

## UPDATE

### 1-17 Bankruptcy and individual insolvency proceedings; introduction

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

AND INDIVIDUAL INSOLVENCY PROCEEDINGS; INTRODUCTION/(ii) Bankruptcy Courts/7. Insolvency districts.

## 7. Insolvency districts.

The Lord Chancellor may by order designate the areas which are for the time being to be comprised in the London insolvency district<sup>1</sup> and the insolvency district of each county court<sup>2</sup>; and such an order may exclude any county court from having jurisdiction or confer jurisdiction on any county court which has not previously had that jurisdiction<sup>3</sup>.

1 Subject to any order under the Insolvency Act 1986 s 374, the district which, immediately before 29 December 1986 (see para 2 ante), was the London bankruptcy district became, on 29 December 1986, the London insolvency district: s 374(4)(a). Immediately before 29 December 1986 the London bankruptcy district comprised the City of London and its liberties and all places within the districts of the following county courts: Barnet; Bloomsbury; Bow; Brentford; Clerkenwell; Edmonton; Lambeth; Mayor's and City of London; Shoreditch; Wandsworth; West London; Westminster; and Willesden: Bankruptcy Act 1914 s 99, Sch 3 (repealed) read together with the Civil Courts Order 1983, SI 1983/713 (amended by SI 1984/297; SI 1984/1075; SI 1985/511; SI 1986/754; SI 1986/1361; SI 1986/2001; SI 1986/2207). A British warship, wherever it may be, is deemed part of the parish of Stepney and persons on it are within the London insolvency district: see *Fraser v Akers* (1891) cited in 35 Sol Jo 477; *Seagrave v Parks* [1891] 1 QB 551.

2 Subject to any order under the Insolvency Act 1986 s 374, any district which, immediately before 29 December 1986, was the bankruptcy district of a county court became, on 29 December 1986, the insolvency district of that court; and any county court which immediately before 29 December 1986 was excluded from having jurisdiction in bankruptcy is excluded, on and after 29 December 1986, from having jurisdiction for the purposes of Pts VIII-XI (ss 252-385) (as amended): s 374(4)(b), (c). As to such insolvency districts and county courts see the Civil Courts Order 1983, SI 1983/713, art 7, Sch 3 (amended by SI 1984/297; SI 1984/1075; SI 1985/511; SI 1986/754; SI 1986/1361; SI 1986/2001; SI 1986/2207; SI 1988/2165; SI 1989/106; SI 1989/107; SI 1989/914; SI 1991/1809; SI 1991/2211; SI 1992/593; SI 1992/1345; SI 1992/1810; SI 1992/3071; SI 1993/1809; SI 1993/3120; SI 1994/706; SI 1994/1536; SI 1994/2626; SI 1994/2893; SI 1995/1897; SI 1995/3173; SI 1996/68; SI 1996/588; SI 1996/2579; SI 1997/361; SI 1997/1085; SI 1997/2310; SI 1997/2762; SI 1998/1880; SI 1998/2910; SI 1999/216; SI 1999/1011; SI 1999/3187; SI 2000/1482; SI 2000/2738; SI 2001/4025).

3 Insolvency Act 1986 s 374(1). An order under s 374 may contain such incidental, supplemental and transitional provisions as may appear to the Lord Chancellor necessary or expedient (s 374(2)); and any such order must be made by statutory instrument and, after being made, must be laid before each House of Parliament (s 374(3)). At the date at which this volume states the law no such order had been made but, by virtue of s 437, Sch 11 para 23 (see para 2 note 3 head (1) ante), the Civil Courts Order 1983, SI 1983/713, Sch 3 (as amended: see note 2 supra) continues to have effect. As to alternative courts for debtors' petitions see para 188 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 374 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

## UPDATE

### 1-17 Bankruptcy and individual insolvency proceedings; introduction

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## 7 Insolvency districts

TEXT AND NOTES--Insolvency Act 1986 s 374 amended: Constitutional Reform Act 2005 Sch 4 para 187.

NOTES 1, 3--The county courts at Clerkenwell and Shoreditch have been replaced by the Clerkenwell & Shoreditch County Court, which is excluded from having jurisdiction under the 1986 Act: Civil Courts (Amendment) Order 2006, SI 2006/1542.

NOTE 2--SI 1983/713 Sch 3 further amended: SI 2005/2923, SI 2006/1542, SI 2007/786, SI 2009/2455, SI 2009/3320.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(1) BANKRUPTCY AND INDIVIDUAL INSOLVENCY PROCEEDINGS; INTRODUCTION/(iii) Persons subject to Bankruptcy Law/8. Who may be made bankrupt.

### **(iii) Persons subject to Bankruptcy Law**

#### **8. Who may be made bankrupt.**

Subject to the statutory conditions, any individual within the jurisdiction of a bankruptcy court<sup>1</sup> owing a debt or debts, the amount of which, or the aggregate amount of which, is equal to or exceeds the bankruptcy level, the payment of which may be enforced against him personally, may be made bankrupt<sup>2</sup>. There is no distinction in English law between traders and non-traders as there is in some foreign jurisdictions<sup>3</sup>.

1 As to bankruptcy courts see paras 6, 7 ante.

2 See para 124 et seq post.

3 Certain offences apply, however, only to persons carrying on a trade or business: see para 707 et seq post.

#### **UPDATE**

#### **1-17 Bankruptcy and individual insolvency proceedings; introduction**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **9. Married women.**

Subject to the statutory conditions, a married woman is subject to bankruptcy law and to the enforcement of judgment debts and orders in the same way as if she were a feme sole<sup>1</sup>.

1 See the Law Reform (Married Women and Tortfeasors) Act 1935 s 1(d); para 124 et seq post; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 204, 210.

## **UPDATE**

### **1-17 Bankruptcy and individual insolvency proceedings; introduction**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(1) BANKRUPTCY AND INDIVIDUAL INSOLVENCY PROCEEDINGS; INTRODUCTION/(iii) Persons subject to Bankruptcy Law/10. Persons incapable of managing their affairs.

### **10. Persons incapable of managing their affairs.**

Incapacity is no bar to being made bankrupt; and the Insolvency Rules 1986 make specific provision with respect to persons incapable of managing their affairs<sup>1</sup>.

<sup>1</sup> See the Insolvency Rules 1986, SI 1986/1925, Pt 7 Ch 7 (rr 7.43-7.46); and para 815 post.

## **UPDATE**

### **1-17 Bankruptcy and individual insolvency proceedings; introduction**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **11. Foreigners and debtors residing abroad.**

Subject to the statutory conditions<sup>1</sup>, a foreign national or a British subject residing abroad may be made the subject of bankruptcy proceedings. The debt need not necessarily have been incurred within the jurisdiction, nor need the petitioning creditor have any territorial connection with England and Wales<sup>2</sup>. A bankruptcy petition may, with the permission of the court, be served outside England and Wales in such manner as the court may direct<sup>3</sup>.

<sup>1</sup> A bankruptcy petition may not be presented to the court in respect of a debtor who is not domiciled in England and Wales unless the debtor is personally present in England and Wales on the day on which the petition is presented, or at any time in the period of three years ending with that day the debtor: (1) has been ordinarily resident, or has had a place of residence, in England and Wales; or (2) has carried on business in England and Wales: see the Insolvency Act 1986 s 265(1)(b), (c); and para 125 heads (2), (3) post.

<sup>2</sup> As to creditors who may present a bankruptcy petition see para 136 et seq post.

<sup>3</sup> See the Insolvency Rules 1986, SI 1986/1925, r 12.12(2); and para 800 post. A statutory demand is not a document issued by the court and, therefore, permission to serve out of the jurisdiction is not required: *Practice Direction-Insolvency Proceedings* para 10.1. As to statutory demands generally see para 154 et seq post.

## UPDATE

### 1-17 Bankruptcy and individual insolvency proceedings; introduction

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## 12. Minors.

The status of minority<sup>1</sup> as such is irrelevant to the exercise of bankruptcy jurisdiction. A minor may be adjudged bankrupt, or may present a petition against himself in respect of any debt or debts which are legally enforceable against him<sup>2</sup>. At common law<sup>3</sup> the general rule is that a minor's contracts are voidable at the instance of the minor<sup>4</sup>, but contracts for necessities<sup>5</sup> and contracts for education, apprenticeship and service<sup>6</sup> are enforceable, provided that they are beneficial to the minor<sup>7</sup>.

Where a person ('the claimant') has, on or after 9 June 1987, entered into a contract with another ('the defendant'), and the contract is unenforceable against the defendant, or he repudiates it, because he was a minor when the contract was made, the court may, if it is just and equitable to do so, require the defendant to transfer to the claimant any property acquired by the defendant under the contract, or any property representing it<sup>8</sup>. Where a guarantee is given in respect of an obligation of a party to a contract made on or after 9 June 1987, and the obligation is unenforceable against him, or he repudiates the contract, because he was a minor when the contract was made, the guarantee is not for that reason alone unenforceable against the guarantor<sup>9</sup>.

A minor may be made bankrupt on a debt due to the Crown in respect of tax or excise duty<sup>10</sup>.

<sup>1</sup> The age of majority is 18 years: see the Family Law Reform Act 1969 s 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 1.

<sup>2</sup> *Re Smedley* (1864) 10 LT 432; *Re Purser, ex p Stevenson* (1868) 19 LT 23; *Re Jones, ex p Jones* (1881) 18 ChD 109, CA (in all of which a bankruptcy order was refused as there was no legally enforceable debt against the minor); *R v Newmarket Income Tax Comrs, ex p Huxley* [1916] 1 KB 788, CA; *Re A Debtor (No 564 of 1949), ex p Customs and Excise Comrs v Debtor* [1950] Ch 282, [1950] 1 All ER 308, CA (where the earlier decisions relating to bankruptcy jurisdiction over minors were reviewed); *Re Davenport, ex p Bankrupt v Eric Street Properties Ltd* [1963] 2 All ER 850, [1963] 1 WLR 817, CA (where the petitioning creditor's debt was not for necessities and the bankruptcy order was annulled by the court in its discretion under the Bankruptcy Act 1914 s 29(1) (repealed and replaced by the Insolvency Act 1986 s 282(1): see para 610 post)). A respondent who is a minor must have a litigation friend to conduct proceedings on his behalf unless the court orders otherwise: see CPR 21.2(2); CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 10; and CIVIL PROCEDURE vol 11 (2009) PARA 222.

<sup>3</sup> The Infants Relief Act 1874 was repealed by the Minors' Contracts Act 1987 ss 1(a), 4(2), which came into force on 9 June 1987: see s 5(2). Minors' contracts are now governed entirely by common law principles.

4 Such contracts remain binding on the other party, and will be valid against the minor unless he avoided the contracts during his minority or within a reasonable time after attaining his majority: *North Western Rly Co v M'Michael* (1850) 5 Exch 114.

5 'Necessaries' means goods suitable to the condition in life of the minor or other person concerned and to his actual requirements at the time of the sale and delivery: see the Sale of Goods Act 1979 s 3(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 37. Where necessities are sold and delivered to a minor, he must pay a reasonable price for them: see s 3(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 37. What is a reasonable price is a question of fact dependent on the circumstances of each particular case: see s 8(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 56.

'Necessaries' also includes services: see *Huggins v Wiseman* (1690) Carth 110 (medical services); *Chapple v Cooper* (1844) 13 M & W 252 (funeral services); *Helps v Clayton* (1864) 17 CBNS 553; *Re Jones (an infant)* (1883) 48 LT 188 (legal services).

A minor's trading contracts are not contracts for necessities: *Lowe v Griffith* (1835) 1 Hodg 30; *Lovell and Christmas v Beauchamp* [1894] AC 607, HL; explained in *Re A Debtor (No 564 of 1949), ex p Customs and Excise Comrs v Debtor* [1950] Ch 282, [1950] 1 All ER 308, CA.

6 As to contracts of apprenticeship and service see *Clements v London and North Western Rly Co* [1894] 2 QB 482 at 491, CA; and as to education see *Roberts v Gray* [1913] 1 KB 520 (professional billiards playing).

7 The contract, even for necessities, must be beneficial to the minor and will be unenforceable if it contains harsh and oppressive terms: *Flower v London and North Western Rly Co* [1894] 2 QB 65, CA (contract for necessary carriage nevertheless voidable because of exemption clause in respect of liability for injury even if caused by negligence; but see now the Unfair Contract Terms Act 1977 and CONTRACT vol 9(1) (Reissue) para 820 et seq); *Buckpitt v Oates* [1968] 1 All ER 1145.

8 See the Minors' Contracts Act 1987 s 3(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 24. Nothing in s 3 is to be taken to prejudice any other remedy available to the claimant: s 3(2). It is apprehended that an order under s 3 would constitute a bankruptcy debt: see para 491 post.

9 See *ibid* s 2; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 14.

10 *R v Newmarket Income Tax Comrs, ex p Huxley* [1916] 1 KB 788, CA; *Re A Debtor (No 564 of 1949), ex p Customs and Excise Comrs v Debtor* [1950] Ch 282, [1950] 1 All ER 308, CA.

## UPDATE

### 1-17 Bankruptcy and individual insolvency proceedings; introduction

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 12 Minors

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(1) BANKRUPTCY AND INDIVIDUAL INSOLVENCY PROCEEDINGS; INTRODUCTION/(iii) Persons subject to Bankruptcy Law/13. Diplomats.

### 13. Diplomats.



An ambassador, a minister or a consul accredited by a foreign government is exempt from local jurisdiction, and, even though a British subject, may claim privilege from bankruptcy law<sup>1</sup>. This privilege attaches to a bona fide member of the embassy even if he is a British subject, but not when his appointment has been obtained for the purpose of using the privilege to defeat creditors<sup>2</sup>. The Attorney General's statement on the instructions of the Foreign and Commonwealth Office as to the status of a person claiming immunity from judicial process on the ground of diplomatic privilege is conclusive<sup>3</sup>. However, diplomatic privileges and immunities are now generally regulated by statute<sup>4</sup>.

1 See *Macartney v Garbutt* (1890) 24 QBD 368; the Diplomatic Privileges Act 1964; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 265 et seq. Such immunity may be waived by the foreign state or by its head of mission: see *R v Madan* [1961] 2 QB 1, [1961] 1 All ER 588, CCA; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 283.

2 *Re Cloete, ex p Cloete* (1891) 8 Morr 195, CA.

3 *Engelke v Musmann* [1928] AC 433, HL.

4 See generally INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 265 et seq. They now extend to senior representatives of many international organisations.

## UPDATE

### 1-17 Bankruptcy and individual insolvency proceedings; introduction

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## 14. Corporations and companies.

No corporation, nor any association or company registered under the Companies Acts, is liable to bankruptcy proceedings<sup>1</sup>.

1 A petition for a bankruptcy order may be presented against an individual only: see the Insolvency Act 1986 s 264; and para 124 post. As to the winding up of companies see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 432 et seq.

## UPDATE

### 1-17 Bankruptcy and individual insolvency proceedings; introduction

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## **15. Members of Parliament.**

Bankruptcy proceedings may be commenced against members of either House of Parliament, privilege of Parliament being no defence to a petition in bankruptcy<sup>1</sup>.

<sup>1</sup> See the Insolvency Act 1986 s 427(7); and para 697 post. As to the disqualification of an individual who has been adjudged bankrupt for being a member of either House of Parliament see also PARLIAMENT vol 78 (2010) PARA 903.

### **UPDATE**

#### **1-17 Bankruptcy and individual insolvency proceedings; introduction**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **15 Members of Parliament**

TEXT AND NOTE 1--Insolvency Act 1986 s 427(7) repealed: Enterprise Act 2002 s 266(2) (b).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(1) BANKRUPTCY AND INDIVIDUAL INSOLVENCY PROCEEDINGS; INTRODUCTION/(iii) Persons subject to Bankruptcy Law/16. Partners.

## **16. Partners.**

Bankruptcy proceedings may be commenced against an individual who is a partner<sup>1</sup>.

<sup>1</sup> As to bankruptcy proceedings against partners and partnerships see para 817 et seq post.

### **UPDATE**

#### **1-17 Bankruptcy and individual insolvency proceedings; introduction**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(1) BANKRUPTCY

AND INDIVIDUAL INSOLVENCY PROCEEDINGS; INTRODUCTION/(iii) Persons subject to Bankruptcy Law/17. Undischarged bankrupts.

### **17. Undischarged bankrupts.**

Being adjudged bankrupt is no bar to further bankruptcy proceedings; and a second or subsequent bankruptcy order may be made in respect of liabilities incurred after the commencement<sup>1</sup> of the earlier bankruptcy<sup>2</sup>.

1 As to the commencement of bankruptcy see para 213 post.

2 Under the Bankruptcy Act 1914 (repealed) the court had a discretion in such a case whether to make a receiving order which would lead to a further adjudication and might refuse to make such an order if it was satisfied that there would be no assets for administration under the subsequent bankruptcy: *Re Betts, ex p Betts* [1897] 1 QB 50, CA. However, the debtor's own affidavit that there was no prospect of assets was not enough: *Re Betts, ex p Betts* supra. The court has a similar discretion under the Insolvency Act 1986: see s 266(3); *Re Thulin* [1995] 1 WLR 165; and para 124 post. As to later bankruptcies see paras 471, 607-609 post.

## **UPDATE**

### **1-17 Bankruptcy and individual insolvency proceedings; introduction**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY/(i) Functions of the Secretary of State/18. In general.

## **(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY**

### **(i) Functions of the Secretary of State**

#### **18. In general.**

The Secretary of State for Trade and Industry<sup>1</sup> has various powers and duties in connection with individual insolvency. Such powers and duties concern primarily the administration and financial control of bankruptcy. The Secretary of State has wide powers to make rules and regulations<sup>2</sup>. He has power to prescribe and inspect the records to be maintained by all insolvency practitioners<sup>3</sup>; and he exercises a general surveillance over the records and accounts required to be maintained by trustees in bankruptcy, with power to carry out an audit of the accounts which must be submitted to him by trustees<sup>4</sup>. The Secretary of State is responsible for official receivers<sup>5</sup> and for the qualification of insolvency practitioners<sup>6</sup>.

The Secretary of State must keep an account with the Bank of England, called the Insolvency Services Account, into which all moneys received by him in respect of insolvency proceedings must be paid<sup>7</sup>. He may, however, allow trustees to operate a local bank account instead of their paying moneys into the Insolvency Services Account<sup>8</sup>.

1 As to the Secretary of State for Trade and Industry see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 506.

- 2 See para 21 post.
- 3 See para 76 et seq post.
- 4 See para 380 et seq post.
- 5 See paras 19, 31 et seq post.
- 6 See paras 20, 47 et seq post.
- 7 See paras 26, 386 et seq post.
- 8 See para 388 post.

## **UPDATE**

### **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **18 In general**

NOTES--As to the fee payable in respect of the performance by the Secretary of State of her duties in relation to the administration of the estate of a bankrupt see the Insolvency Proceedings (Fees) Order 2004, SI 2004/593, Sch 2 para 2 Fee B2 (amended by SI 2009/645).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY/(i) Functions of the Secretary of State/19. Appointment and control of official receivers.

### **19. Appointment and control of official receivers.**

The Secretary of State appoints, removes, defines the duties of, and fixes the salary and other terms and conditions of office of, official receivers<sup>1</sup>. Where a person holds the office of official receiver, the Secretary of State must from time to time attach him either to the High Court or to a county court; and, subject to any directions given by the Secretary of State, an official receiver attached to a particular court is the person authorised to act as the official receiver in relation to every bankruptcy falling within the jurisdiction of that court<sup>2</sup>.

The Secretary of State must ensure that there is, at all times, at least one official receiver attached to the High Court and at least one attached to each county court having jurisdiction in bankruptcy proceedings; but he may attach the same official receiver to two or more different courts<sup>2</sup>. The Secretary of State may give directions with respect to the disposal of the business of official receivers<sup>2</sup>.

- 1 See para 31 et seq post.
- 2 See para 31 post.

## **UPDATE**

### **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY/(i) Functions of the Secretary of State/20. Qualification of insolvency practitioners.

### **20. Qualification of insolvency practitioners.**

A person is not qualified to act as an insolvency practitioner in relation to another person unless at the time he is authorised so to act by virtue of membership of a recognised professional body or he holds an authorisation granted by a competent authority<sup>1</sup>. The Secretary of State may by order declare a body to be a recognised professional body for such purposes<sup>2</sup>. An order so made may be revoked by a further order if it appears to the Secretary of State that the body no longer fulfils the statutory requirements<sup>3</sup>.

Application may be made to a competent authority for authorisation to act as an insolvency practitioner<sup>3</sup>. A competent authority is either a body or person specified in directions given by the Secretary of State, or the Secretary of State<sup>3</sup>. Such application must be accompanied by the prescribed fee; and any sums so received by the Secretary of State must be paid into the Consolidated Fund<sup>3</sup>.

1 See paras 47-49 post.

2 See para 48 post.

3 See para 49 post.

## **UPDATE**

### **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY/(i) Functions of the Secretary of State/21. Rules and regulations.

### **21. Rules and regulations.**

With the concurrence of the Secretary of State, the Lord Chancellor may make general rules for the purpose of giving effect to the provisions of the Insolvency Act 1986 relating to the insolvency or bankruptcy of individuals<sup>1</sup>.

The Secretary of State may<sup>2</sup>, subject to the Insolvency Act 1986 and the Insolvency Rules 1986<sup>3</sup>, from time to time make regulations with respect to so much of any matter that may be provided for in the rules as relates to the carrying out of the functions of the interim receiver<sup>4</sup>, of the official receiver while acting as receiver and manager<sup>5</sup> or of a trustee of a bankrupt's estate including, without prejudice to the generality of the above, provision with respect to the following matters arising in individual insolvency:

- 12 (1) the preparation and keeping by trustees, interim receivers and the official receiver, of books, accounts and other records, and their production to such persons as may be authorised or required to inspect them;
- 13 (2) the auditing of trustees' accounts;
- 14 (3) the manner in which trustees are to act in relation to the bankrupt's books, papers and other records, and the manner of their disposal by the responsible insolvency practitioner<sup>6</sup> or others;
- 15 (4) the supply by the trustee to creditors and the creditors' committee<sup>7</sup> of copies of documents relating to the insolvency and the affairs of the insolvent individual, on payment, in such cases as may be specified by the regulations, of the specified fee;
- 16 (5) the manner in which insolvent estates<sup>8</sup> are to be distributed by trustees, including provision with respect to unclaimed funds and dividends;
- 17 (6) the manner in which moneys coming into the hands of a trustee in the course of his administration are to be handled and invested, and the payment of interest on sums which, in pursuance of statutory regulations<sup>9</sup>, have been paid into the Insolvency Services Account<sup>10</sup>;
- 18 (7) the amount, or the manner of determining the amount, to be paid to the official receiver by way of remuneration when acting as interim receiver or trustee<sup>11</sup>.

Such regulations may confer a discretion on the court, make non-compliance with any of the regulations a criminal offence, and make different provision for different cases, including different provision for different areas, and may contain such incidental, supplemental and transitional provisions as may appear to the Secretary of State necessary or expedient<sup>12</sup>.

1 See the Insolvency Act 1986 s 412(1); and para 753 post.

2 Ie pursuant to ibid s 412(2), Sch 9 para 30: see para 753 note 2 head (30) post.

3 Ie the Insolvency Rules 1986, SI 1986/1925 (as amended).

4 Ie under the Insolvency Act 1986 s 286: see para 223 et seq post.

5 Ie under ibid s 287: see para 233 et seq post.

6 For these purposes, 'the responsible insolvency practitioner' means: (1) the person acting in an individual insolvency as the supervisor of a voluntary arrangement under ibid Pt VIII (ss 252-263) (see para 81 et seq post), or as trustee or interim receiver; (2) the official receiver acting as receiver and manager of a bankrupt's estate: Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.9(1)(b), (c). Any reference to the trustee or interim receiver includes the official receiver when acting in the relevant capacity: rr 13.1, 13.9(2).

7 As to the creditors' committee see para 328 et seq post.

8 See para 823 et seq post.

9 Ie made under the Insolvency Rules 1986, SI 1986/1925, r 12.1(1) (as amended).

10 As to the Insolvency Services Account see paras 26, 386 et seq post.

11 Insolvency Act 1986 Sch 9 para 30; Insolvency Rules 1986, SI 1986/1925, r 12.1(1) (amended by SI 1987/1919; SI 2001/763). In the Insolvency Act 1986 'the trustee', in relation to a bankruptcy and the bankrupt, means the trustee of the bankrupt's estate: s 385(1). Any reference in the Insolvency Rules 1986, SI 1986/1925, r 12.1(1) (as so amended) to a trustee includes a reference to the official receiver when acting as a receiver and manager under the Insolvency Act 1986 s 287: Insolvency Rules 1986, SI 1986/1925, r 12.1(2).

In the Insolvency Act 1986, except in so far as the context otherwise requires, 'records' includes computer records and other non-documentary records: s 436. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 436 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

12 Insolvency Rules 1986, SI 1986/1925, r 12.1(3) (amended by SI 1987/1919).

## **UPDATE**

### **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **21 Rules and regulations**

NOTES 2-11--SI 1986/1925 r 12.1(1) further amended: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY/(i) Functions of the Secretary of State/22. Power to prescribe monetary limits.

## **22. Power to prescribe monetary limits.**

The Secretary of State may by order prescribe amounts for the purposes of certain provisions of the Insolvency Act 1986<sup>1</sup>; and any such order may contain such transitional provisions as may appear to the Secretary of State necessary or expedient<sup>2</sup>.

1 le for the purposes of the Insolvency Act 1986 s 273 (minimum value of debtor's estate determining whether immediate bankruptcy order should be made; small bankruptcies level: see para 200 note 4 post), s 346(3) (minimum amount of judgment, determining whether amount recovered on sale of debtor's goods is to be treated as part of his estate in bankruptcy: see para 678 post), s 354(1), (2) (minimum amount of concealed debt, or value of property concealed or removed, determining criminal liability under s 354: see paras 709, 710 post), s 358 (minimum value of property taken by a bankrupt out of England and Wales, determining his criminal liability: see para 718 post), s 360(1) (maximum amount of credit which bankrupt may obtain without disclosure of his status: see para 721 post), s 361(2) (exemption of bankrupt from criminal liability for failure to keep proper accounts, if unsecured debts not more than the prescribed minimum: see para 722 post), s 364(2) (d) (minimum value of goods removed by the bankrupt, determining his liability to arrest: see para 221 head (d) post). References in Pts VIII-XI (ss 252-385) (as amended) to the amount prescribed for the purposes of any of those provisions, and references in those provisions to the prescribed amount, are to be construed accordingly: s 418(1).

2 Ibid s 418(1), (2). An order under s 418 must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 418(3). In exercise of the powers conferred by s 418, and by s 386(1), Sch 6 paras 9, 12 (see para 582 post), the Secretary of State made the Insolvency Proceedings

(Monetary Limits) Order 1986, SI 1986/1996, which came into force on 29 December 1986: art 1(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 418 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

## **UPDATE**

### **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **22 Power to prescribe monetary limits**

NOTE 1--The Secretary of State may by order prescribe amounts for the purposes of the Insolvency Act 1986 s 251S(4) (see PARA 123B), s 313A (see PARA 401) and Sch 4ZA paras 6-8 (see PARA 123B): s 418(1) (amended by the Enterprise Act 2002 s 261(6); Tribunals, Courts and Enforcement Act 2007 Sch 20 para 11).

NOTE 2--SI 1986/1996 amended: SI 2004/547, SI 2009/465.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY/(i) Functions of the Secretary of State/23. Role in bankruptcies.

### **23. Role in bankruptcies.**

If a meeting summoned to appoint a first trustee is held but no appointment of a person as trustee is made, it is the duty of the official receiver to decide whether to refer the need for an appointment to the Secretary of State; and, on such a reference, the Secretary of State must either make an appointment or decline to make one<sup>1</sup>. Where the appointment of any person as trustee fails to take effect or, such an appointment having taken effect, there is otherwise a vacancy in the office of trustee, the Secretary of State must either make an appointment or decline to make one, on a reference to him by the official receiver<sup>2</sup>. If a trustee is appointed by the Secretary of State, he may be removed by a direction of the Secretary of State<sup>3</sup>.

If the official receiver, while he is the trustee, gives notice to the Secretary of State that the administration of the bankrupt's estate is for practical purposes complete, he has his release with effect from such time as the Secretary of State may determine<sup>4</sup>. A person other than the official receiver who has ceased to be the trustee has his release, in the case of a person who has been removed from office by a general meeting of the bankrupt's creditors that has resolved against his release, or by the court, or by the Secretary of State, or who has vacated office on ceasing to be qualified as an insolvency practitioner, from such time as the Secretary of State may, on application by that person, determine<sup>5</sup>.

At any time when the official receiver is the trustee, the functions of the creditors' committee are vested in the Secretary of State<sup>6</sup>. Where there is for the time being no creditors' committee and the trustee is a person other than the official receiver, the functions of the creditors' committee are similarly vested in the Secretary of State<sup>6</sup>.



Where there is comprised in the bankrupt's estate property consisting of an interest in a dwelling house which is occupied by the bankrupt or by his spouse or former spouse and the trustee has been unable for any reason to realise that property, the trustee may not summon a final meeting unless (inter alia) the Secretary of State has issued a certificate to the trustee stating that it would be inappropriate or inexpedient for an application for an order charging such property for the benefit of the bankrupt's estate to be made in the case in question<sup>7</sup>.

An appeal lies at the instance of the Secretary of State from any order of the court made on an application for the rescission or annulment of a bankruptcy order, or for a bankrupt's discharge<sup>8</sup>.

1 See para 321 post.

2 See para 368 post.

3 See para 367 post.

4 See para 377 post.

5 See para 376 post.

6 See para 343 post.

7 See para 606 post.

8 See para 740 post.

## **UPDATE**

### **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY/(i) Functions of the Secretary of State/24. Appeals against decisions of Secretary of State.

### **24. Appeals against decisions of Secretary of State.**

An appeal<sup>1</sup> against a decision of the Secretary of State must be brought within 28 days of the notification of the decision<sup>2</sup>.

1 ie under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 See *ibid* r 7.50; and para 749 post.

## **UPDATE**

### **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY/(i) Functions of the Secretary of State/25. Annual report to Parliament.

## **25. Annual report to Parliament.**

As soon as practicable after the end of each calendar year, the Secretary of State must prepare and lay before each House of Parliament a report about the operation during that year of the statutory provisions relating to the insolvency or bankruptcy of individuals<sup>1</sup> and about proceedings in the course of that year under the Deeds of Arrangement Act 1914<sup>2</sup>.

1    le the provisions contained in the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

2    Ibid s 379. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 379 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post; and as to the Deeds of Arrangement Act 1914 see para 859 et seq post.

## **UPDATE**

### **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY/(ii) Insolvency Service Finance, Accounting and Investment/26. Insolvency Services Account.

## **(ii) Insolvency Service Finance, Accounting and Investment**

### **26. Insolvency Services Account.**

All money received by the Secretary of State in respect of proceedings under the Insolvency Act 1986 as it applies to England and Wales must be paid into the Insolvency Services Account kept by the Secretary of State with the Bank of England; and all payments out of money standing to the credit of the Secretary of State in that account must be made by the Bank of England in such manner as he may direct<sup>1</sup>.

Whenever the cash balance standing to the credit of the Insolvency Services Account is in excess of the amount which, in the opinion of the Secretary of State, is required for the time being to answer demands in respect of bankrupts' estates, he must notify the excess to the

National Debt Commissioners<sup>2</sup>, and must pay into the Insolvency Services Investment Account<sup>3</sup> the whole or any part of the excess as the Commissioners may require<sup>4</sup> in accordance with certain statutory provisions<sup>5</sup>.

Whenever, in the Secretary of State's opinion, any part of the money so invested is required to answer demands in respect of bankrupts' estates, he must notify to the National Debt Commissioners the amount so required, and the Commissioners must thereupon repay to the Secretary of State such sum as may be required to the credit of the Insolvency Services Account; and, for that purpose, they may direct the sale of any such part of the securities in which the money has been invested as may be necessary<sup>6</sup>.

If, after any repayment due to it from the Insolvency Services Investment Account, the Insolvency Services Account is insufficient to meet its liabilities, the Treasury may, on being informed of it by the Secretary of State, issue the amount of the deficiency out of the Consolidated Fund<sup>7</sup>, and the Treasury must certify the deficiency to Parliament<sup>8</sup>.

1 Insolvency Act 1986 s 403(1). As to payment into and out of the account see paras 386, 387 respectively post. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 403 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

2 As to the National Debt Commissioners see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1332.

3 The Insolvency Services Investment Account is an account kept by the National Debt Commissioners with the Bank of England (see para 27 post): Insolvency Act 1986 s 403(2)(b).

4 Ie in accordance with ibid ss 403(3)-410: see para 27 et seq post.

5 Ibid s 403(2).

6 Ibid s 403(3).

7 As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 711.

8 Insolvency Act 1986 s 408. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 408 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

## **UPDATE**

### **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **26 Insolvency Services Account**

TEXT AND NOTES 7, 8--Replaced.

The Treasury may direct the payment out of the Consolidated Fund of sums into the Insolvency Services Account or the Investment Account: Insolvency Act 1986 s 408(1) (s 408 substituted: Enterprise Act 2002 s 272(2)). The Treasury must certify to the House of Commons the reason for any payment under the 1986 Act s 408(1): s 408(2). The Secretary of State may pay sums out of the Insolvency Services Account into the Consolidated Fund: s 408(3) (s 408 as so substituted). The National Debt

Commissioners may pay sums out of the Investment Account into the Consolidated Fund: s 408(4).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY/(ii) Insolvency Service Finance, Accounting and Investment/27. Insolvency Services Investment Account.

## **27. Insolvency Services Investment Account.**

Any money standing to the credit of the Insolvency Services Investment Account<sup>1</sup>, including any money received by the National Debt Commissioners<sup>2</sup> by way of interest on or proceeds of any investment, may be invested by the Commissioners in accordance with such directions as may be given by the Treasury, in any manner for the time being specified<sup>3</sup> in the Trustee Investments Act 1961<sup>4</sup>.

Where the annual account to be kept by the Commissioners<sup>5</sup> shows that in the year for which it is made up the gross amount of the interest accrued from the securities standing to the credit of the Insolvency Services Investment Account exceeded the aggregate of:

- 19 (1) a sum, to be determined by the Treasury, to provide against the depreciation in the value of the securities; and
- 20 (2) the sums paid into the Insolvency Services Account<sup>6</sup> together with the sums paid<sup>6</sup> to the Commissioners of Inland Revenue in pursuance of the statutory provisions relating to interest on money received by liquidators and invested<sup>6</sup>,

the National Debt Commissioners must, within three months after the account is laid before Parliament, cause the amount of the excess to be paid out of the Insolvency Services Investment Account into the Consolidated Fund<sup>7</sup> in such manner as may from time to time be agreed between the Treasury and the Commissioners<sup>8</sup>.

Where such annual account shows that in the year for which it is made up the gross amount of interest accrued from the securities standing to the credit of the Insolvency Services Investment Account is less than the aggregate mentioned above, an amount equal to the deficiency must, at such times as the Treasury directs, be paid out of the Consolidated Fund into the Insolvency Services Investment Account<sup>9</sup>.

If the Insolvency Services Investment Account is insufficient to meet its liabilities, the Treasury may, on being informed of the insufficiency by the National Debt Commissioners, issue the amount of the deficiency out of the Consolidated Fund, and the Treasury must certify the deficiency to Parliament<sup>10</sup>.

1 As to the Insolvency Services Account see para 26 ante.

2 As to the National Debt Commissioners see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1332.

3 As specified in the Trustee Investments Act 1961 s 1, Sch 1 Pt II (as amended): see TRUSTS vol 48 (2007 Reissue) para 1017 et seq. Schedule 1 Pt II (as amended) is repealed by the Trustee Act 2000 s 40(1), (3), Sch 2 Pt I para 1(1), Sch 4 Pt I as from 1 February 2001 (see s 42(2), (3)), except in so far as it is applied by or under any other enactment.

4 Insolvency Act 1986 s 404. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 404 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36.

As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

5 le under the Insolvency Act 1986 s 409: see para 30 post.

6 le in pursuance of ibid s 406 (as amended): see para 28 post.

7 As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 711.

8 Insolvency Act 1986 s 405(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 405 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

9 Insolvency Act 1986 s 405(2).

10 Ibid s 405(3).

## UPDATE

### 18-30 Secretary of State for Trade and Industry

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 27 Insolvency Services Investment Account

TEXT AND NOTES 5-10--Insolvency Act 1986 s 405 repealed: Enterprise Act 2002 s 272(1).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(2) SECRETARY OF STATE FOR TRADE AND INDUSTRY/(ii) Insolvency Service Finance, Accounting and Investment/28. Investment or otherwise handling of funds; payment of interest.

### 28. Investment or otherwise handling of funds; payment of interest.

The Lord Chancellor may, with the concurrence of the Secretary of State, make rules providing for the manner in which moneys received by the trustee of a bankrupt's estate in the course of carrying out his functions are to be invested or otherwise handled and providing for the payment of interest on sums which have been paid into the Insolvency Services Account<sup>1</sup>.

Accordingly, where the cash balance standing to the credit of the bankrupt in the account in respect of that bankrupt kept by the Secretary of State is in excess of the amount which, in the opinion of the trustee<sup>2</sup>, is required for the immediate purposes of the bankruptcy and should be invested, he may request the Secretary of State to invest the amount not so required in government securities, to be placed to the credit of that account for the benefit of the bankrupt<sup>3</sup>. When any of the money so invested is, in the opinion of the trustee, required for the immediate purposes of the bankruptcy, he may request the Secretary of State to raise such sum as may be required by the sale of such of those securities as may be necessary<sup>4</sup>.

Whenever the amount standing to the credit of a bankrupt in the Insolvency Services Account on or after 2 April 2001 exceeds £2,000, the bankrupt is entitled to interest on the excess at the rate of 3.5% per annum, provided that:

- 21 (1) where, in the opinion of the trustee, it is necessary or expedient in order to facilitate the conclusion of the bankruptcy that interest should cease to accrue, he may give notice in writing to the Secretary of State to that effect and interest ceases to accrue from the date of receipt of that notice by the Secretary of State; and
- 22 (2) at any time after receipt by the Secretary of State of a notice under head (1) above, provided that the balance standing to the credit of the bankrupt exceeds £2,000, the trustee may give notice in writing to the Secretary of State requesting that interest should accrue on the excess and interest starts to accrue on the excess at the rate of 3.5% per annum from the date of receipt of the notice by the Secretary of State<sup>5</sup>.

All money received in respect of investments and interest earned under the above provisions must be paid into the Insolvency Services Account to the credit of the bankrupt<sup>6</sup>. Where a bankrupt's estate has become entitled to any sum by way of interest, the Secretary of State must certify that sum and the amount of tax payable on it to the National Debt Commissioners<sup>7</sup> who must pay, out of the Insolvency Services Investment Account<sup>8</sup>, into the Insolvency Services Account the sum certified less the amount of tax certified and to the Commissioners of the Inland Revenue<sup>9</sup> the amount of tax certified<sup>10</sup>.

1 Insolvency Act 1986 s 412(1), Sch 9 para 21 (amended by the Insolvency Act 2000 s 13(1)). As to the Insolvency Services Account see para 26 ante.

2 For these purposes, except where the context otherwise requires, 'trustee' means trustee of a bankrupt's estate including the official receiver when so acting: Insolvency Regulations 1994, SI 1994/2507, reg 3(1). However, in addition to the application of the provisions of Pt 3 (regs 19-31 (as amended): see *infra*; and paras 380 et seq, 589 post) to the official receiver when acting as trustee, the provisions of Pt 3 (regs 19-31) (as amended), other than reg 30 (see para 385 post) and reg 31 (see para 590 post) also apply to him when he is acting as receiver or manager under the Insolvency Act 1986 s 287 (see para 233 et seq post); and the term 'trustee' is to be construed accordingly: Insolvency Regulations 1994, SI 1994/2507, reg 19(2).

3 *Ibid* reg 23A(1) (added by SI 2001/762). In cases where investments have been made at the request of the trustee in pursuance of the Insolvency Regulations 1994, SI 1994/2507, reg 23A(1) (as so added) and additional sums to the amounts so invested, including money received under reg 23A(7) (as added) (see *infra*), are paid into the Insolvency Services Account to the credit of the bankrupt, a request must be made to the Secretary of State by the trustee if it is desired that these additional funds should be invested: reg 23A(3) (added by SI 2001/762).

Any request relating to the investment in, or sale of, as the case may be, Treasury Bills under the Insolvency Regulations 1994, SI 1994/2507, reg 23A(1) or (3) (as so added) or under reg 23A(2) (as added) (see *infra*) must be made on a form obtainable from the Department of Trade and Industry or on one that is substantially similar; and any request relating to the purchase or sale, as the case may be, of any other type of government security made thereunder must be made in writing: reg 23A(4) (added by SI 2001/762). Any request made under the Insolvency Regulations 1994, SI 1994/2507, reg 23A(1) or (3) (as so added) or under reg 23A(2) (as added) (see *infra*) is sufficient authority to the Secretary of State for the investment or sale, as the case may be: reg 23A(5) (added by SI 2001/762).

4 Insolvency Regulations 1994, SI 1994/2507, reg 23A(2) (added by SI 2001/762). See also note 3 *supra*.

5 Insolvency Regulations 1994, SI 1994/2507, reg 23A(6) (added by SI 2001/762).

6 Insolvency Regulations 1994, SI 1994/2507, reg 23A(7) (added by SI 2001/762).

7 As to the National Debt Commissioners see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1332.

8 As to the Insolvency Services Investment Account see para 27 ante.

9 As to the Commissioners of Inland Revenue see INCOME TAXATION.

10 Insolvency Act 1986 s 406 (amended by the Insolvency Act 2000 s 13(2)).

## UPDATE

## **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **28 Investment or otherwise handling of funds; payment of interest**

TEXT AND NOTE 1--Insolvency Act 1986 s 412 amended: Constitutional Reform Act 2005 Sch 4 para 189; Tribunals, Courts and Enforcement Act 2007 Sch 20 para 8.

NOTE 3--For 'Department of Trade and Industry' read 'Department for Business, Enterprise and Regulatory Reform': SI 1994/2507 (amended by SI 2007/3224). As to the fee payable in relation to a request made by a trustee in bankruptcy for the purchase of government securities see the Insolvency Proceedings (Fees) Order 2004, SI 2004/593, Sch 2 para 2 Fee INV1 (amended by SI 2009/645).

TEXT AND NOTE 5--Replaced. Now, subject to SI 1994/2507 reg 23A(6A), (6B), at any time after 1 April 2004 whenever there is any money standing to the credit of the estate of the bankrupt in the Insolvency Services Account, the estate is entitled to interest on that money at the rate of 4.75% per annum: reg 23A(6) (substituted by SI 2004/472; amount varied with effect from 11 November 2008: the London Gazette, 7 November 2008). Interest ceases to accrue pursuant to SI 1994/2507 reg 23A(6) from the date of receipt by the Secretary of State of a notice in writing by the trustee that in the opinion of the trustee it is necessary or expedient in order to facilitate the conclusion of the bankruptcy that interest ceases to accrue, but interest starts to accrue again pursuant to reg 23A(6) where the trustee gives a further notice in writing to the Secretary of State requesting that interest should start to accrue again: reg 23A(6A) (reg 23A(6A), (6B) added by SI 2004/472). The Secretary of State may by notice published in the London Gazette vary the rate of interest prescribed by SI 1994/2507 reg 23A(6) and such variation has effect from the day after the date of publication of the notice in the London Gazette or such later date as may be specified in the notice: reg 23A(6B).

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## **29. Unclaimed dividends; undistributed balances.**

The Secretary of State must from time to time pay into the Consolidated Fund<sup>1</sup> out of the Insolvency Services Account<sup>2</sup> so much of the sums standing to the credit of that account as represents:

- 23 (1) dividends which were declared before such date as the Treasury may from time to time determine and have not been claimed; and
- 24 (2) balances ascertained before that date which are too small to be divided among the persons entitled to them<sup>3</sup>.

For these purposes, the sums standing to the credit of the Insolvency Services Account are deemed to include any sums paid out of that account and represented by any sums or securities standing to the credit of the Insolvency Services Investment Account<sup>4</sup>.

The Secretary of State may require the National Debt Commissioners<sup>5</sup> to pay out of the Insolvency Services Investment Account into the Insolvency Services Account the whole or part of any sum which he is required so to pay out of that account under the above provisions; and the Commissioners may direct the sale of such securities standing to the credit of the Insolvency Services Investment Account as may be necessary for that purpose<sup>6</sup>.

1 As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 711.

2 As to the Insolvency Services Account see para 26 ante.

3 Insolvency Act 1986 s 407(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 407 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

4 Insolvency Act 1986 s 407(2). As to the Insolvency Services Investment Account see para 27 ante.

5 As to the National Debt Commissioners see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1332.

6 Insolvency Act 1986 s 407(3).

## **UPDATE**

### **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **30. Annual financial statement; audit.**

The National Debt Commissioners<sup>1</sup> must for each year ending on 31 March prepare a statement of the sums credited and debited to the Insolvency Services Investment Account<sup>2</sup> in such form and manner as the Treasury may direct and must transmit it to the Comptroller and Auditor General<sup>3</sup> before the end of November next following the year<sup>4</sup>.

The Secretary of State must for each year ending 31 March prepare a statement of the sums received or paid by him<sup>5</sup> in such form and manner as the Treasury may direct and must transmit each statement to the Comptroller and Auditor General before the end of November next following the year<sup>6</sup>.

Every statement<sup>7</sup> must include such additional information as the Treasury may direct<sup>8</sup>.

The Comptroller and Auditor General must examine, verify and report on every such statement and must lay copies of it, and of his report, before Parliament<sup>9</sup>.



- 1 As to the National Debt Commissioners see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1332.
- 2 As to the Insolvency Services Investment Account see para 27 ante.
- 3 As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 724-726.
- 4 Insolvency Act 1986 s 409(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 409 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3 (1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.
- 5 Ie under the Insolvency Act 1986 s 403: see para 26 ante.
- 6 Ibid s 409(2).
- 7 Ie whether by the National Debt Commissioners or by the Secretary of State.
- 8 Insolvency Act 1986 s 409(3).
- 9 Ibid s 409(4).

## **UPDATE**

### **18-30 Secretary of State for Trade and Industry**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## **(3) OFFICIAL RECEIVERS**

### **(i) Appointment and Status**

#### **31. Appointment of official receivers.**

The official receiver, in relation to any bankruptcy, is any person who is authorised<sup>1</sup> to act as the official receiver in relation to that bankruptcy<sup>2</sup>. The Secretary of State may, subject to the approval of the Treasury as to numbers, appoint persons to the office of official receiver, and a person appointed to that office<sup>3</sup> must be paid out of money provided by Parliament such salary as the Secretary of State may, with the concurrence of the Treasury, direct, holds office on such other terms and conditions as the Secretary of State may, with the concurrence of the Treasury, direct, and may be removed from office by a direction of the Secretary of State<sup>4</sup>. Where a person holds the office of official receiver, the Secretary of State must from time to time attach him either to the High Court or to a county court having jurisdiction for the purposes of the provisions<sup>5</sup> dealing with the insolvency of individuals and bankruptcy<sup>6</sup>.

Subject to any directions<sup>7</sup> by the Secretary of State, an official receiver attached to a particular court is the person authorised to act as the official receiver in relation to every bankruptcy falling within the jurisdiction of that court<sup>8</sup>. The Secretary of State must ensure that there is, at all times, at least one official receiver attached to the High Court and at least one attached to each county court having jurisdiction for the purposes of the provisions dealing with the

insolvency of individuals and bankruptcy, but he may attach the same official receiver to two or more different courts<sup>9</sup>. The Secretary of State may give directions with respect to the disposal of the business of official receivers<sup>10</sup>, and such directions may, in particular:

- 25 (1) authorise an official receiver attached to one court to act as the official receiver in relation to any case or description of cases falling within the jurisdiction of another court; and
- 26 (2) provide, where there is more than one official receiver authorised to act as the official receiver in relation to cases falling within the jurisdiction of the court, for the distribution of their business between or among themselves<sup>11</sup>.

Judicial notice must be taken of the appointment of official receivers<sup>12</sup>.

1    Ie by virtue of the Insolvency Act 1986 ss 399(2)-(7), 401: see infra; and para 36 post.

2    Ibid s 399(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 399 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

3    Ie whether under the Insolvency Act 1986 s 399 or the Bankruptcy Act 1914 s 70 (repealed).

4    Insolvency Act 1986 s 399(2).

5    Ie the provisions contained in ibid Pts VIII-XI (ss 252-385) (as amended). As to the courts having jurisdiction see paras 6, 7 ante.

6    Ibid s 399(3).

7    Ie under ibid s 399(6): see infra.

8    Ibid s 399(4).

9    Ibid s 399(5).

10   Ie including persons appointed to act as the official receiver's deputy: see ibid s 401(2); and para 36 post.

11   Ibid s 399(6). A person who on 29 December 1986, ie the date of the coming into force of the Insolvency Act 1985 s 222 (repealed and replaced by the Insolvency Act 1986 s 399), was an official receiver attached to a court continued in office after the coming into force of the Insolvency Act 1985 s 222 (repealed) as an official receiver attached to that court under the Insolvency Act 1986 s 399: s 399(7).

12   Insolvency Rules 1986, SI 1986/1925, r 10.1.

## **UPDATE**

### **31-41 Official receivers**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **31 Appointment of official receivers**

TEXT AND NOTES 1, 2--The references to bankruptcy are now to bankruptcy, individual voluntary arrangement, debt relief order or application for such an order: Insolvency Act 1986 s 399(1) (amended by the Enterprise Act 2002 Sch 23 para 14(a); Tribunals, Courts and Enforcement Act 2007 Sch 20 para 7).

TEXT AND NOTE 8--The reference to bankruptcy is now to bankruptcy, individual voluntary arrangement, debt relief order or application for such an order: 1986 Act s 399(4) (amended by the 2002 Act Sch 23 para 14(b); Tribunals, Courts and Enforcement Act 2007 Sch 20 para 7).

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### **32. Functions of official receiver.**

In addition to any functions conferred on him by the Insolvency Act 1986<sup>1</sup>, a person holding the office of official receiver<sup>2</sup> is to carry out such other functions as may from time to time be conferred on him by the Secretary of State<sup>3</sup>.

In so far as the official receiver attached to any court does not already have power to do so, he may authorise an officer of his to exercise any function of his which is conferred by or under any enactment<sup>4</sup>. Anything done or omitted to be done by an officer so authorised in, or in connection with, the exercise or purported exercise of the function is to be treated for all such purposes as done or omitted to be done by the official receiver in his capacity as such<sup>5</sup>; but this provision does not apply for the purposes of any criminal proceedings brought in respect of anything so done or omitted to be so done<sup>6</sup>.

1 The primary function of the official receiver is to act as receiver and manager of the bankrupt's estate pending the vesting of the estate in the trustee and to carry out an investigation into the conduct and affairs of the bankrupt with a report of such investigation to the court if he thinks fit. For various functions conferred on the official receiver under the Insolvency Act 1986 see s 253(3) (application to the court for an interim order for a voluntary arrangement proposed by an undischarged bankrupt: see para 84 post); s 262(2) (challenge to the decision of a creditors' meeting summoned to consider a voluntary arrangement proposed by an undischarged bankrupt: see para 119 post); s 279(3) (application to suspend the running of the relevant period for the purposes of discharge where the bankrupt has failed or is failing to comply with obligations: see para 631 post); s 286(1) (appointment as the interim receiver of debtor's property after the presentation of a petition and before the making of a bankruptcy order: see para 223 post); s 287 (receiver and manager of bankrupt's estate pending the appointment of trustee: see para 233 et seq post); s 288(3) (power to release the bankrupt from his obligation to submit a statement of affairs or to extend the period allowed for its submission: see paras 244, 248 post); s 289(1)-(4) (duty to investigate the conduct and affairs of every bankrupt and to report to the court if he thinks fit: see para 256 post); s 289(5) (discretionary power to investigate the conduct and affairs of the bankrupt where a certificate for summary administration of the bankrupt's estate is in force: see para 256 post); s 290 (application for, and taking part in, the public examination of the bankrupt: see para 291 et seq post); s 293(1), (2) (duty to decide whether to summon a general meeting of creditors to appoint the first trustee and to give notice to the court and every creditor if he decides against summoning such a meeting: see paras 265, 318 post); s 293(3) (appointment as trustee where notice given to the court that he has decided against summoning a meeting of creditors to appoint a trustee: see paras 265, 323 post); s 294(2) (duty to summon a meeting to appoint a trustee where required to do so by one-quarter in value of the bankrupt's creditors: see paras 267, 319 post); s 295(1) (duty to decide whether to refer the need for the appointment of trustee to the Secretary of State where a general meeting of creditors fails to make appointment: see paras 269, 321 post); s 295(4) (appointment as trustee where he decides not to refer need for appointment to the Secretary of State or where the Secretary of State declines to make an appointment: see paras 269, 321, 323 post); s 296(1) (application by the official receiver to the Secretary of State to appoint a person as trustee in place of the official receiver: see para 321 post); s 297(1), (2) (appointment as trustee of the estate where a bankruptcy order is made following a criminal bankruptcy order (see para 323 post) or where the court issues a certificate for the summary administration of the bankrupt's estate (see para 207 post)); s 300 (appointment as trustee when there is a vacancy in office: see para 368 post); ss 305-349 (as amended) (general functions, duties and powers as trustee: see para 390 et seq post); s 346 (involvement in enforcement procedures where execution is not completed before the commencement of bankruptcy: see para 678 et seq post); s 365(1) (application to seize property comprised in the bankrupt's estate: see para 220 post); ss 366, 367 (application for a private examination: see para 307 et seq post); s 369 (application for the production of documents by the inland revenue: see para 301 et seq post); s 370 (application for the appointment of a special manager: see para 237 post); s 371 (application for the redirection of the bankrupt's letters: see paras 264, 468 post); s 372 (as

amended) (application as trustee or interim receiver for the continuation of essential supplies by utilities: see paras 230, 467 post); s 424 (application for an order where the debtor subsequently adjudged bankrupt has entered into a transaction to defraud creditors: see para 665 et seq post).

As to the prospective amendment of s 293(1), and as to the prospective repeal of ss 297(1), 327, see para 844 note 2 post.

2 le including persons appointed to act as the official receiver's deputy: see *ibid* s 401(2); and para 36 post.

3 *Ibid* s 400(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 400 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

4 Deregulation and Contracting Out Act 1994 s 74(1), (4)(b).

5 *Ibid* s 74(2), (4)(b).

6 *Ibid* s 74(3), (4)(b).

## UPDATE

### 31-41 Official receivers

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 32 Functions of official receiver

NOTE 1--The Insolvency Act 1986 s 389B authorises the official receiver to act as nominee or supervisor in relation to a voluntary arrangement, see PARA 109.

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### 33. Power to contract out functions of official receiver.

If the Secretary of State by order so provides, any function of the official receiver which is conferred by or under any enactment and which, by virtue of any enactment or rule of law, may be exercised by an officer of his and which is not otherwise excluded<sup>1</sup> may be exercised by, or by employees of, such person, if any, as may be authorised in that behalf by the official receiver or the Secretary of State<sup>2</sup>. The Secretary of State may not, however, make such an order in relation to the official receiver without first consulting him<sup>3</sup>.

An order so made may provide that any such function may be exercised, and an authorisation given by virtue of such an order may, subject to the provisions of the order, authorise the exercise of such a function:

- 27 (1) either wholly or to such extent as may be specified in the order or
- 28 authorisation;
- 28 (2) either generally or in such cases or areas as may be so specified; and
- 29 (3) either unconditionally or subject to the fulfilment of such conditions as may
- be so specified<sup>4</sup>.

An authorisation given by virtue of such an order:

- 30 (a) must be for such period, not exceeding ten years, as is specified in the authorisation;
- 31 (b) may be revoked at any time by the Secretary of State or the official receiver; and
- 32 (c) must not prevent the Secretary of State or the official receiver or any other person from exercising the function to which the authorisation relates<sup>5</sup>.

Where, by virtue of such an order, a person is authorised to exercise any function of the Secretary of State or the official receiver, anything done or omitted to be done by or in relation to the authorised person (or an employee of his) in, or in connection with, the exercise or purported exercise of the function is to be treated for all purposes as done or omitted to be done by or in relation to the Secretary of State or the official receiver in his capacity as such<sup>6</sup>; but this provision does not apply for the purposes of so much of any contract made between an authorised person and the Secretary of State or the official receiver as relates to the exercise of the function or for the purposes of any criminal proceedings brought in respect of anything done or omitted to be done by the authorised person (or any employee of his)<sup>7</sup>.

Where, by virtue of such an order, a person is authorised to exercise any function of the Secretary of State or the official receiver and the order or authorisation is revoked at a time when a relevant contract<sup>8</sup> is subsisting, the authorised person is entitled to treat the relevant contract as repudiated by the Secretary of State or the official receiver (and not as frustrated by reason of the revocation)<sup>9</sup>.

1     Ie by the Deregulation and Contracting Out Act 1994 s 71. A function is excluded from s 69 (see *infra*) if: (1) its exercise would constitute the exercise of jurisdiction of any court or of any tribunal which exercises the judicial power of the State; or (2) its exercise, or a failure to exercise it, would necessarily interfere with or otherwise affect the liberty of any individual; or (3) it is a power or right of entry, search or seizure into or of any property; or (4) it is a power or duty to make subordinate legislation: s 71(1). Section 71(1)(b), (c) (see heads (2), (3) *supra*) does not exclude any function of the official receiver attached to any court: s 71(2).

2     Ibid ss 69(1), (2), 79. In exercise of the powers so conferred the Secretary of State, after consulting all official receivers, made the Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386: see para 34 *post*.

3     Deregulation and Contracting Out Act 1994 ss 69(3), 79.

4     Ibid s 69(4).

5     Ibid s 69(5).

6     Ibid ss 72(1), (2), 79.

7     Ibid ss 72(3), 79.

8     For these purposes, 'relevant contract' means so much of any contract made between the authorised person and the Secretary of State or the official receiver as relates to the exercise of the functions: *ibid* ss 73(3), 79.

9     Ibid ss 73(1), (2), 79.

## **UPDATE**

### **31-41 Official receivers**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **34. Contracted out functions of official receiver.**

Any function of the official receiver which is conferred by or under the insolvency legislation<sup>1</sup> may be exercised by, or by employees of, such person, if any, as may be authorised in that behalf by the official receiver, except for the following functions<sup>2</sup>:

- 33 (1) the functions of the official receiver as<sup>3</sup> interim receiver<sup>4</sup>;
- 34 (2) the receipt of any deposit which relates to a bankruptcy petition<sup>5</sup>;
- 35 (3) the chairing<sup>6</sup> of the first meeting of creditors<sup>7</sup> in a bankruptcy<sup>8</sup>;
- 36 (4) the making of an application to the Secretary of State for the appointment<sup>9</sup> of a person as trustee instead of the official receiver<sup>10</sup>;
- 37 (5) the taking of a decision whether or not to refer<sup>11</sup> to the Secretary of State the need for an appointment of a trustee in any case where at a meeting duly summoned<sup>12</sup> no appointment of a person as trustee is made<sup>13</sup>;
- 38 (6) the making of a reference<sup>14</sup> to the Secretary of State of the need for an appointment of a trustee where a vacancy has arisen and, in the period of 28 days beginning with the day on which the vacancy first came to the official receiver's attention, he has not summoned, and is not proposing to summon, a general meeting of creditors for the purpose of filling the vacancy<sup>15</sup>;
- 39 (7) the making of a reference<sup>16</sup> to the court or Secretary of State, as the case may be, of the need for an appointment of a trustee where a vacancy has arisen and where a certificate for the summary administration of the estate is for the time being in force<sup>17</sup>;
- 40 (8) the functions:
  - 1 (a) of a creditors' committee exercisable<sup>18</sup> by the official receiver; or
  - 2 (b) of the official receiver in relation to the hearing of an application to the court<sup>19</sup> by a bankrupt for a release or extension of time in respect of the statement of affairs<sup>20</sup>;
- 2 (9) the giving of notice to the Secretary of State<sup>21</sup> of the release of the official receiver as trustee<sup>22</sup>;
- 41 (10) consideration as to whether<sup>23</sup> a request by creditors for a meeting of creditors has been properly made in accordance with the Insolvency Act 1986<sup>24</sup>;
- 42 (11) the making or conduct of any application to the court:
  - 3 (a) to commit a bankrupt for contempt of court for failure to comply with an obligation imposed on him in relation to his statement of affairs<sup>25</sup>, his duties in relation to the official receiver<sup>26</sup>, his obligation to surrender control to the trustee<sup>27</sup>, his duties in relation to the trustee<sup>28</sup> and in relation to the general control of the court<sup>29</sup>; or
  - 4 (b) for the suspension<sup>30</sup> of the discharge of a bankrupt<sup>31</sup>;
- 4 (12) the making or conduct of any application to the court to commit for contempt of court a person who has failed to attend<sup>32</sup> his public examination<sup>33</sup>;
- 44 (13) the making of a report to the court pursuant to the provisions relating to:
  - 5

5. (a) an investigation by the official receiver<sup>34</sup>;
  6. (b) a report to the court etc on an application by a bankrupt for discharge from bankruptcy<sup>35</sup>;
  7. (c) a report to the court etc on application by a bankrupt for release from his duty to submit a statement of affairs or for an extension of time<sup>36</sup>;
  8. (d) a report<sup>37</sup> in support of an application for the suspension of the discharge of a bankrupt<sup>38</sup>;
- 6
- 46 (14) the making or conduct of an application to the court for a public examination<sup>39</sup> and the making or conduct of any application in relation to any public examination<sup>40</sup>;
  - 47 (15) the making or conduct of an application to the court to relieve the official receiver from an obligation to make an application for a public examination duly<sup>41</sup> requested<sup>42</sup>;
  - 48 (16) the taking part in a public examination or the questioning<sup>43</sup> of a bankrupt<sup>44</sup>;
  - 49 (17) the making or conduct of an application to the court for the issue<sup>45</sup> of a warrant for the arrest of a debtor, an undischarged bankrupt or a discharged bankrupt, and for the seizure of any books, papers, records, money or goods in that person's possession, as the case may be<sup>46</sup>;
  - 50 (18) the making or conduct of an application to the court for the transfer of bankruptcy proceedings from one court to another<sup>47</sup>;
  - 51 (19) the taking<sup>48</sup> of affidavits and declarations<sup>49</sup>;
  - 52 (20) any function of the official receiver in relation to the hearing of an application by a bankrupt for permission to act as a director of, or directly or indirectly, to take part in or be concerned in the promotion, formation or management of, a company<sup>50</sup>;
  - 53 (21) any function corresponding to one referred to in heads (1) to (20) above which is exercisable by the official receiver by virtue of an application, with or without modifications, of any provision of the insolvency legislation to insolvent partnerships<sup>51</sup>.

A function which may be so contracted out, and which involves the exercise of a right of audience<sup>52</sup> in relation to any proceedings before a court, may only be exercised subject to the following condition, that is to say that such right of audience may not be exercised by any person other than a person who has a right of audience in relation to the proceedings in question by virtue of Part II<sup>53</sup> of the Courts and Legal Services Act 1990<sup>54</sup>.

1 For these purposes, 'the insolvency legislation' means the Insolvency Act 1986, the Companies Act 1985, the Company Directors Disqualification Act 1986 and any subordinate legislation made under any of those Acts and any regulations made under the Insolvency Rules 1986, SI 1986/1925, r 12.1 (as amended) (see para 21 ante): Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, art 2(1).

2 Ibid art 3(1). As to the contracting out of the official receiver's functions in relation to corporate insolvency proceedings see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 506.

3 Ie pursuant to the Insolvency Act 1986 s 286: see para 222 et seq post.

4 Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, art 3(1), Schedule para 1(c).

5 Ibid Schedule para 2. As to the deposit payable on the presentation of a bankruptcy petition see para 164 post.

6 Ie by virtue of the Insolvency Rules 1986, SI 1986/1925, r 6.82: see para 271 post.

7 Ie as defined in ibid r 6.79(7): see para 267 post.

8 Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 3(b).

- 9    le under the Insolvency Act 1986 s 296(1): see para 321 post.
- 10   Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 4(b).
- 11   le pursuant to the Insolvency Act 1986 s 295(1): see para 321 post.
- 12   le summoned under *ibid* s 293 or s 294: see paras 318, 319 post.
- 13   Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 5(b).
- 14   le pursuant to the Insolvency Act 1986 s 300(4): see para 368 post.
- 15   Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 6.
- 16   le pursuant to the Insolvency Act 1986 s 300(5): see para 368 post.
- 17   Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 7.
- 18   le the functions exercisable under the Insolvency Rules 1986 r 6.166(2): see para 343 post.
- 19   le under *ibid* r 6.62(2): see para 248 post.
- 20   Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 8(a), (b)(iii).
- 21   le pursuant to the Insolvency Act 1986 s 299(2): see para 375 post.
- 22   Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 10.
- 23   le pursuant to the Insolvency Rules 1986, SI 1986/1925, r 6.83(2): see para 272 post.
- 24   Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 11(c).
- 25   le under the Insolvency Act 1986 s 288: see para 244 post.
- 26   le under *ibid* s 291: see para 243 post.
- 27   le under *ibid* s 312: see para 396 post.
- 28   le under *ibid* s 333: see para 345 post.
- 29   le under *ibid* s 363: see para 219 post.
- 30   le pursuant to *ibid* s 279(3): see para 633 post.
- 31   Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 12.
- 32   le under the Insolvency Act 1986 s 290: see para 291 et seq post.
- 33   Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 13(b).
- 34   le pursuant to the Insolvency Act 1986 s 289(1): see para 256 post.
- 35   le pursuant to *ibid* s 289(2): see para 636 post.
- 36   le pursuant to the Insolvency Rules 1986, SI 1986/1925, r 6.62(5): see para 248 post.
- 37   le pursuant to *ibid* r 6.215(2): see para 634 post.
- 38   Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 14(b), (c), (e), (f).
- 39   le under the Insolvency Act 1986 s 290(1): see para 291 et seq post.
- 40   Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 15.
- 41   le pursuant to the Insolvency Act 1986 s 290(2): see para 292 post.



- 42 Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 16.
- 43 Ie pursuant to the Insolvency Act 1986 s 290(4)(a): see para 295 post.
- 44 Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 17.
- 45 Ie pursuant to the Insolvency Act 1986 s 364: see para 221 post.
- 46 Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 18(b).
- 47 Ibid Schedule para 20. As to the transfer of bankruptcy proceedings see para 734 post.
- 48 Ie pursuant to the Insolvency Rules 1986, SI 1986/1925, r 7.57(5) (as substituted): see para 790 post.
- 49 Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, Schedule para 21.
- 50 Ibid Schedule para 22(a). As to applications for permission see para 704 post.
- 51 Ibid Schedule para 24. As to insolvent partnerships see para 817 et seq post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1166 et seq.
- 52 For these purposes, 'right of audience' means the right to exercise any of the functions of appearing before and addressing a court, including the calling and examining of witnesses: Courts and Legal Services Act 1990 s 119(1) (as amended) (applied by the Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, art 2(1)).
- 53 Ie the Courts and Legal Services Act 1990 Pt II (ss 17-70) (as amended): see COURTS.
- 54 Contracting Out (Functions of the Official Receiver) Order 1995, SI 1995/1386, art 3(2), (3).

## **UPDATE**

### **31-41 Official receivers**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **34 Contracted out functions of official receiver**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(3) OFFICIAL RECEIVERS/(i) Appointment and Status/35. Status of official receiver.

### **35. Status of official receiver.**

In the exercise of the functions of his office<sup>1</sup> a person holding the office of official receiver must act under the general directions of the Secretary of State and is also an officer of the court<sup>2</sup> in relation to which he exercises those functions<sup>3</sup>.

The official receiver may apply to the court for directions in relation to any matter arising in insolvency proceedings<sup>4</sup>.

Any property vested in his official capacity<sup>5</sup> in a person holding the office of official receiver vests, on his dying, ceasing to hold office or being otherwise succeeded in relation to the bankruptcy in question by another official receiver, in his successor without any conveyance, assignment or transfer<sup>6</sup>.

1 See para 32 ante.

2 See *Bottomley v Brougham* [1908] 1 KB 584; *Burr v Smith* [1909] 2 KB 306, CA. As to the application of the principles in *Re Condon, ex p James* (1874) 9 Ch App 609 to officers of the court see para 459 post. Where the official receiver acts in the course of bankruptcy proceedings and prepares reports for the purpose of such proceedings, any statements made in such reports are entitled to absolute privilege and the official receiver is immune from action in respect of them: *Mond v Hyde* [1999] QB 1097, [1998] 3 All ER 833, CA.

3 Insolvency Act 1986 s 400(2). As to the application of s 400 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 32 note 3 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 10.3. For these purposes, 'insolvency proceedings' means any proceedings under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended): rr 13.1, 13.7.

5 See the Insolvency Act 1986 s 306; and para 391 post.

6 Ibid s 400(3).

## UPDATE

### 31-41 Official receivers

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(3) OFFICIAL RECEIVERS/(i) Appointment and Status/36. Deputy official receiver and staff.

### 36. Deputy official receiver and staff.

The Secretary of State may, if he thinks it expedient to do so in order to facilitate the disposal of the business of the official receiver attached to any court, appoint an officer of his department to act as deputy to that official receiver<sup>1</sup>. Subject to any directions given by the Secretary of State<sup>2</sup>, a person appointed to act as deputy to an official receiver has, on such conditions and for such period as may be specified in the terms of his appointment, the same status and functions as the official receiver to whom he is appointed deputy<sup>3</sup>. An appointment of a person to act as deputy official receiver<sup>4</sup> may be terminated at any time by the Secretary of State<sup>5</sup>. Judicial notice must be taken of the appointment of deputy official receivers<sup>6</sup>. The Secretary of State may, subject to the approval of the Treasury as to numbers and remuneration and as to the other terms and conditions of the appointments, appoint officers of his department to assist official receivers in the carrying out of their functions<sup>7</sup>.

1 Insolvency Act 1986 s 401(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 401 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

2    le under the Insolvency Act 1986 ss 399, 400: see paras 31, 35 ante.

3    Ibid s 401(2). Accordingly, references in the Insolvency Act 1986, except s 399(1)-(5) (see para 31 ante), to an official receiver include a person appointed to act as his deputy: s 401(2).

4    le under ibid s 401(1): see supra.

5    Ibid s 401(3).

6    Insolvency Rules 1986, SI 1986/1925, r 10.1.

7    Insolvency Act 1986 s 401(4).

## **UPDATE**

### **31-41 Official receivers**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(3) OFFICIAL RECEIVERS/(i) Appointment and Status/37. Persons entitled to act on official receiver's behalf.

### **37. Persons entitled to act on official receiver's behalf.**

In the absence of the official receiver authorised to act in a particular case, an officer authorised in writing for the purpose by the Secretary of State, or by the official receiver himself, may, with the permission of the court, act on the official receiver's behalf and in his place in any public<sup>1</sup> or private<sup>2</sup> examination, and in respect of any application to the court<sup>3</sup>. In case of emergency, where there is no official receiver capable of acting, anything to be done by, to or before the official receiver may be done by, to or before the registrar of the court<sup>4</sup>.

1    le under the Insolvency Act 1986 s 290: see para 291 et seq post.

2    le under ibid s 366: see para 307 et seq post.

3    Insolvency Rules 1986, SI 1986/1925, r 10.2(1).

4    Ibid r 10.2(2). For the meaning of 'registrar' see para 764 note 3 post.

## **UPDATE**

### **31-41 Official receivers**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **37 Persons entitled to act on official receiver's behalf**

NOTE 3--SI 1986/1925 r 10.2(1) amended: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(3) OFFICIAL RECEIVERS/(i) Appointment and Status/38. Appeal against decisions of official receiver.

### **38. Appeal against decisions of official receiver.**

An appeal<sup>1</sup> against a decision of the official receiver must be brought within 28 days of the notification of the decision<sup>2</sup>.

1     le under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

2     Ibid r 7.50. See further para 747 post.

#### **UPDATE**

#### **31-41 Official receivers**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **38 Appeal against decisions of official receiver**

TEXT AND NOTES--SI 1986/1925 r 7.50 now r 7.50(1), r 7.50(2) added: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(3) OFFICIAL RECEIVERS/(ii) Remuneration and Expenses/39. Remuneration as official receiver.

### **(ii) Remuneration and Expenses**

#### **39. Remuneration as official receiver.**

In respect of the performance by the official receiver of his functions under the Insolvency Act 1986<sup>1</sup>, such fees are payable as the Lord Chancellor may, with the sanction of the Treasury, direct<sup>2</sup>. Where the official receiver acts in respect of individual insolvency proceedings, he is paid the prescribed fees<sup>3</sup>, which must be taken in cash<sup>4</sup>.

1     le under the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

2     Ibid s 415(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 415 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

3     For the prescribed fee see the Insolvency Fees Order 1986, SI 1986/2030, art 4, Schedule Pt II (amended by SI 1988/95; SI 1991/496; SI 1992/34; SI 1994/2541; SI 2001/761). There are prescribed limits on certain fees: see the Insolvency Fees Order 1986, SI 1986/2030, art 4A (added by SI 1994/2541). As to fees orders generally see para 816 post.

4 Insolvency Fees Order 1986, SI 1986/2030, art 5(1). When a fee is paid to an officer of a court, the person paying the fee must inform the officer whether the fee relates to a company insolvency proceeding or an individual insolvency proceeding: art 5(2). Where any value added tax is chargeable in respect of the provision of a service for which a fee is prescribed by art 4, Schedule (as amended), the amount of the value added tax is payable in addition to that fee: art 6.

## **UPDATE**

### **31-41 Official receivers**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **39 Remuneration as official receiver**

TEXT AND NOTES 1, 2--Insolvency Act 1986 s 415 amended: Tribunals, Courts and Enforcement Act 2007 Sch 20 para 9.

TEXT AND NOTES 3, 4--Replaced. As to the prescribed fees payable to an official receiver acting in insolvency proceedings see now the Insolvency Proceedings (Fees) Order 2004, SI 2004/593, Sch 2 (amended by SI 2005/544, SI 2006/561, SI 2007/521, SI 2008/714, SI 2009/645). Where a proposal for an individual voluntary arrangement with the official receiver acting as nominee (see PARA 109) is notified to the official receiver, the notification must be accompanied by a deposit of £315 as security for the official receiver's fees, the deposit being refundable if the official receiver declines to act in relation to the proposal: art 7. Where proposals made by a bankrupt for an individual voluntary arrangement with the official receiver acting as supervisor (see PARA 109) are approved by the bankrupt's creditors, the official receiver's administration fee is reduced to £857.50 and any payments made in respect of the fee which exceed that amount are refunded to the credit of the estate of the bankrupt: art 8. Where value added tax is chargeable in respect of the provision of a service for which a fee is prescribed, except for that prescribed by art 5 (see PARA 164), the amount of the value added tax is payable in addition to the fee: art 9.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(3) OFFICIAL RECEIVERS/(ii) Remuneration and Expenses/40. Official receiver's remuneration as trustee or interim receiver.

### **40. Official receiver's remuneration as trustee or interim receiver.**

When the official receiver is the trustee or the interim receiver of a bankrupt's estate, his remuneration for his services as such must be calculated on the prescribed scales<sup>1</sup>. When the official receiver is the trustee, his remuneration is calculated as a percentage of the money received by him from the realisation of the assets of the bankrupt including any value added tax received on the realisation but after deducting any sums paid to secured creditors<sup>2</sup> in respect of their securities and any sums spent out of money received in carrying on the business of the bankrupt<sup>3</sup>, and a percentage of the value of the assets distributed to the bankrupt's creditors<sup>4</sup>, including payments made in respect of preferential debts<sup>5</sup>.

Where the official receiver is an interim receiver<sup>6</sup> or where as official receiver he performs any duty as trustee for which remuneration is not provided<sup>7</sup> or a fee is not provided under any order made under the Insolvency Act 1986<sup>8</sup>, the official receiver's remuneration for the services provided by himself and his officers in that capacity must be calculated on the specified<sup>9</sup> total hourly rate<sup>10</sup>.

1    le the scales in the Insolvency Regulations 1994, SI 1994/2507, regs 33-35, Sch 2, Tables 1-3: see *infra*.

2    See para 561 post.

3    See para 382 post.

4    See para 573 et seq post.

5    Insolvency Regulations 1994, SI 1994/2507, reg 33, Sch 2, Table 1. That part of the official receiver's remuneration of his services as trustee which is calculated in accordance with Sch 2, Table 1 must not exceed such sum as is arrived at by:

10    (1)   applying that scale to such part of the proceeds of the realisation of the bankrupt's assets as is required to pay:

3.   (a)   the bankruptcy debts to the extent required to be paid by the Insolvency Rules 1986, SI 1986/1925 (as amended), ignoring those debts paid otherwise than out of the proceeds of the realisation of the bankrupt's assets or which have been secured to the satisfaction of the court;

3

4.   (b)   the expenses of the bankruptcy other than the fees or the remuneration of the official receiver and any sums spent out of money received in carrying on the business of the bankrupt;

4

5.   (c)   fees payable under the Insolvency Fees Order 1986, SI 1986/2030 (as amended) other than Schedule, Pt II, Fees 5, 13; and

5

6.   (d)   the remuneration of the official receiver other than remuneration calculated pursuant to the Insolvency Regulations 1994, SI 1994/2507, reg 33 by reference to the realisation scale in the Insolvency Regulations 1994, SI 1994/2507, Sch 2, Table 1; and

6

11   (2)   deducting from the sum arrived at under head (1) *supra* any sum paid in respect of the Insolvency Fees Order 1986, SI 1986/2030, Schedule Pt II, Fee 5:

Insolvency Regulations 1994, SI 1994/2507, reg 34(1). For these purposes, the expression 'bankruptcy debts' includes any interest payable by virtue of the Insolvency Act 1986 s 328(4) (see para 555 post): Insolvency Regulations 1994, SI 1994/2507, reg 34(2). As to preferential debts see para 577 et seq post.

6    le under the Insolvency Act 1986 s 286: see para 223 et seq post.

7    le by the Insolvency Regulations 1994, SI 1994/2507 (as amended).

8    le under the Insolvency Act 1986 s 415: see para 816 post.

9    le specified in the Insolvency Regulations 1994, SI 1994/2507, reg 35(1), (2), Sch 2, Tables 2, 3. Schedule 2, Table 2 is to be used when calculating the remuneration of the official receiver of the London insolvency district and Sch 2, Table 3 is to be used when calculating the remuneration of the official receiver of any other district: reg 35(2). For the meaning of 'the London insolvency district' see para 7 note 1 ante; and as to insolvency districts generally see para 7 ante.

10   Ibid reg 35(1).

## UPDATE

### 31-41 Official receivers

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **40 Official receiver's remuneration as trustee or interim receiver**

TEXT AND NOTES 1-5--Revoked: SI 2004/472.

TEXT AND NOTES 6-10--SI 1994/2507 reg 35 substituted: SI 2005/512.

TEXT AND NOTE 7--Reference to remuneration not being provided omitted: SI 1994/2507 reg 35(1).

NOTE 9--SI 1994/2507 Sch 2 Tables 2, 3 substituted: SI 2009/482.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(3) OFFICIAL RECEIVERS/(ii) Remuneration and Expenses/41. Official receiver's expenses.

#### **41. Official receiver's expenses.**

Any expenses<sup>1</sup> incurred by the official receiver, in whatever capacity he may be acting, in connection with proceedings taken against him in insolvency proceedings<sup>2</sup> are to be treated as expenses of the insolvency proceedings for this purpose<sup>3</sup>. In relation to any sums due to the official receiver in relation to such expenses, he has a charge on the bankrupt's estate or, as the case may be, the debtor's property<sup>4</sup>.

1 For these purposes, 'expenses' includes damages: Insolvency Rules 1986, SI 1986/1925, r 10.4(1).

2 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 10.4(1). See also r 12.2; and para 574 post. In the event of a costs order being made in his favour following proceedings, the official receiver is in the same position as the Treasury Solicitor or a solicitor employed by a party to litigation and is accordingly entitled to the recovery of costs in respect of time expended by himself and his staff and is not limited to the recovery of disbursements: *Re Minotaur Data Systems Ltd, Official Receiver v Brunt* [1999] 3 All ER 122, [1999] 1 WLR 1129, CA.

4 Insolvency Rules 1986, SI 1986/1925, rr 10.4(2), 13.1, 13.8(b). As to the order of priority of the expenses of the bankruptcy see r 6.224 (as amended); and para 576 post.

#### **UPDATE**

#### **31-41 Official receivers**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(4) INSOLVENCY PRACTITIONERS AND THEIR QUALIFICATION/(i) Restrictions on Unqualified Person acting as an Insolvency Practitioner/42. In general.

## **(4) INSOLVENCY PRACTITIONERS AND THEIR QUALIFICATION**

### **(i) Restrictions on Unqualified Person acting as an Insolvency Practitioner**

#### **42. In general.**

The Insolvency Act 1986 introduced a system of licensing to ensure the professional competence and skill of insolvency practitioners in individual and corporate insolvency<sup>1</sup>. A person who is not an individual is not qualified to act as an insolvency practitioner<sup>2</sup>; nor is he qualified so to act if he is subject to one of the statutory exceptions<sup>3</sup>.

A person is not qualified to act as an insolvency practitioner unless at that time:

- 54 (1) he is authorised by virtue of membership of a recognised professional body<sup>4</sup>,  
or he holds an authorisation granted by a competent authority<sup>5</sup>;
- 55 (2) he fulfils the prescribed requirements as to education and practical training  
and experience<sup>6</sup>; and
- 56 (3) there is in force security for the proper performance of his functions<sup>7</sup>.

Application may be made to a competent authority for authorisation to act as an insolvency practitioner<sup>8</sup>; and the authority may grant or refuse the application<sup>9</sup>. Where the competent authority proposes to refuse such an application or withdraw an authorisation, it must give the applicant or holder written notice of its intention to do so<sup>10</sup>; and the applicant may give written notice to the authority requiring the case to be referred to the Insolvency Practitioners Tribunal<sup>11</sup>. On such a reference, the tribunal must investigate the case and make a report to the competent authority stating what would in its opinion be the appropriate decision in the matter and the reason for that opinion; and it is the duty of the competent authority to decide the matter accordingly<sup>12</sup>.

When acting in relation to any person, an insolvency practitioner must maintain, allow the inspection of and preserve prescribed records<sup>13</sup>.

- 1 As to insolvency practitioners and their qualification see para 43 et seq post.
- 2 For the meaning of 'act as an insolvency practitioner' see para 43 post.
- 3 I.e. the exceptions in the Insolvency Act 1986 s 390(4): see para 47 heads (a)-(c) post.
- 4 As to recognised professional bodies see para 48 post.
- 5 As to authorisation by a competent authority see para 49 post.
- 6 See paras 52, 53 post.
- 7 See para 54 post.
- 8 See para 49 et seq post.
- 9 See para 50 post.
- 10 See para 58 post.
- 11 See para 60 et seq post.
- 12 See para 63 post.



13 See para 76 et seq post.

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#### **43. Meaning of 'act as an insolvency practitioner'.**

A person acts as an insolvency practitioner in relation to an individual<sup>1</sup> by acting:

- 57 (1) as his trustee in bankruptcy or interim receiver of his property; or
- 58 (2) as trustee of a deed which is a deed of arrangement made for the benefit of his creditors; or
- 59 (3) as supervisor of a voluntary arrangement proposed by him and approved under Part VIII of the Insolvency Act 1986<sup>2</sup>; or
- 60 (4) in the case of a deceased individual to the administration of whose estate these provisions apply<sup>3</sup>, as administrator of that estate<sup>4</sup>.

Nothing in the above provisions applies to anything done by the official receiver<sup>5</sup>.

1 References in the Insolvency Act 1986 s 388 (as amended) to an individual include, except in so far as the context otherwise requires, references to a partnership: s 388(3). For the meaning of 'act as an insolvency practitioner' in relation to an insolvent partnership see s 388(2A) (added by the Insolvent Partnerships Order 1994, SI 1994/2421, art 15(1)) and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1295; and for the meaning of 'act as an insolvency practitioner' in relation to a company see the Insolvency Act 1986 s 388(1) and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 8. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 388 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

2 Ie under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq post.

3 Ie in the case of a deceased individual to the administration of whose estate *ibid* s 388 (as amended) applies by virtue of an order under s 421 (as amended): see para 823 et seq post.

4 *Ibid* s 388(2). As from such day as the Secretary of State may by order made by statutory instrument appoint:

12 (1) for s 388(2)(c) (see text head (3) *supra*) there is to be substituted:

7. '(c) where a voluntary arrangement in relation to the individual is proposed or approved under Part VIII, as nominee or supervisor';  
7

13 (2) after s 388(2A) (as added) there is to be inserted:

8. '(2B) In relation to a voluntary arrangement proposed under Part I or Part VIII, a person acts as nominee if he performs any of the functions conferred on nominees under the Part in question':  
8

Insolvency Act 2000 ss 4(1), (2)(b), (c), 16(1), (3). At the date at which this volume states the law no such day had been appointed.

5 Insolvency Act 1986 s 388(5)(a) (substituted by the Bankruptcy (Scotland) Act 1993 s 11(1)).

#### **UPDATE**

### **43 Meaning of 'act as an insolvency practitioner'**

NOTES--Nothing in the 1986 Act s 388 applies to anything done (whether in the United Kingdom or elsewhere) in relation to insolvency proceedings under EC Council Regulation 1346/2000 in a member state other than the United Kingdom: 1986 Act s 388(6) (added by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240).

NOTE 4--Day now appointed: SI 2002/2711.

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### **44. Offence of acting as an insolvency practitioner without qualification.**

A person who acts as an insolvency practitioner<sup>1</sup> in relation to an individual at a time when he is not qualified to do so is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>2</sup>.

The above provisions do not, however, apply to the official receiver<sup>3</sup>.

1 For the meaning of 'act as an insolvency practitioner' see para 43 ante.

2 Insolvency Act 1986 ss 389(1), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 389 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

As from such day as the Secretary of State may by order made by statutory instrument appoint after the Insolvency Act 1986 s 389(1) there is to be inserted:

14 '(1A) This section is subject to section 389A':

Insolvency Act 2000 ss 4(1), (3), 16(1), (3). At the date at which this volume states the law no such day had been appointed.

As from such day as the Secretary of State may by order made by statutory instrument appoint after the Insolvency Act 1986 s 389 (as amended) there is to be added s 389A: see para 45 post.

3 Ibid s 389(2) (amended by the Bankruptcy (Scotland) Act 1993 s 11(2)).

### **UPDATE**

### **44 Offence of acting as an insolvency practitioner without qualification**

NOTE 2--Day now appointed for purposes of Insolvency Act 1986 ss 389(1A), 389A: SI 2002/2711.

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PRACTITIONERS AND THEIR QUALIFICATION/(i) Restrictions on Unqualified Person acting as an Insolvency Practitioner/45. Authorisation of nominees and supervisors.

#### **45. Authorisation of nominees and supervisors.**

The offence of acting as an insolvency practitioner without qualification<sup>1</sup> does not apply to a person acting, in relation to an individual voluntary arrangement duly proposed or approved<sup>2</sup>, as nominee<sup>3</sup> or supervisor<sup>4</sup> if he is authorised so to act<sup>5</sup>.

An individual, not being a person who:

- 61 (1) has been adjudged bankrupt<sup>6</sup> or of whose estate sequestration has been awarded and, in either case, has not been discharged<sup>7</sup>;
- 62 (2) is subject to a disqualification order made or a disqualification undertaking accepted<sup>8</sup>; or
- 63 (3) is a patient<sup>9</sup>,

is authorised to act as nominee or supervisor in relation to such an arrangement if:

- 64 (a) he is a member of a body corporate recognised for the purpose<sup>10</sup> by the Secretary of State; and
- 65 (b) there is in force security (in Scotland, caution) for the proper performance of his functions and that security or caution meets the prescribed requirements with respect to his so acting in relation to the arrangement<sup>11</sup>.

1    Ie the Insolvency Act 1986 s 389: see para 47 ante.

2    Ie under ibid Pt VIII (ss 252-263): see para 81 et seq post.

3    For the meaning of 'the nominee' see para 81 post.

4    For the meaning of 'the supervisor' see para 81 post.

5    Insolvency Act 1986 s 389A(1) (added by the Insolvency Act 2000 s 4(4)). The Insolvency Act 2000 s 4(4) comes into force on such day as the Secretary of State may by order made by statutory instrument appoint: s 16(1), (3). At the date at which this volume states the law no such day had been appointed.

6    As to the making of bankruptcy orders see para 195 et seq post.

7    As to discharge from bankruptcy see para 629 et seq post.

8    Ie under the Company Directors Disqualification Act 1986: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1107 et seq.

9    Ie within the meaning of the Mental Health Act Pt VII (ss 93-113 (as amended)): see MENTAL HEALTH vol 30(2) (Reissue) para 681) or the Mental Health (Scotland) Act 1984 s 125(1).

10   The Secretary of State may by order declare a body which appears to him to fall within the Insolvency Act 1986 s 389A(5) (as added) to be a recognised body for these purposes: s 389A(4) (added by the Insolvency Act 2000 s 4(4)). An order so made in relation to a body may be revoked by a further order if it appears to the Secretary of State that the body no longer falls within the Insolvency Act 1986 s 389A(5) (as added): s 389A(7) (added by the Insolvency Act 2000 s 4(4)). An order of the Secretary of State under the Insolvency Act 1986 s 389A (as added) has effect from such date as is specified in the order; and any such order revoking a previous order may make provision for members of the body in question to continue to be treated as members of a recognised body for a specified period after the revocation takes effect: s 389A(8) (added by the Insolvency Act 2000 s 4(4)). A body may be so recognised if it maintains and enforces rules for securing that its members: (1) are fit and proper persons to act as nominees or supervisors; and (2) meet acceptable requirements as to education and practical training and experience: Insolvency Act 1986 s 389A(5) (added by the Insolvency Act 2000 s 4(4)). For these purposes, a person is a member of a body only if he is subject to its rules when acting as nominee or supervisor, whether or not he is in fact a member of the body: Insolvency Act 1986 s 389A(6)

(added by the Insolvency Act 2000 s 4(4)). As to the recognition of professional bodies generally see para 48 post. See also note 5 supra.

11 Insolvency Act 1986 s 389A(2), (3) (added by the Insolvency Act 2000 s 4(4)). See also note 5 supra.

## UPDATE

### 45 Authorisation of nominees and supervisors

NOTE 5--Day now appointed: SI 2002/2711.

NOTE 11--Insolvency Act 1986 s 389A(2) amended: SI 2009/3081. Insolvency Act 1986 s 389A(3) amended: Mental Capacity Act 2005 Sch 6 para 31(2), Sch 7, SI 2009/1941.

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### 46. Competition and abuse of a dominant position.

Agreements between undertakings, decisions by associations of undertakings or concerted practices<sup>1</sup> which may affect trade within the United Kingdom<sup>2</sup> and have as their object or effect the prevention, restriction or distortion of competition are prohibited and void<sup>3</sup>. The prohibition does not, however, apply to any agreement to the extent that it constitutes a designated professional rule, imposes obligations arising from designated rules or constitutes an agreement to act in accordance with such rules<sup>4</sup>. For these purposes, a designated professional rule is a rule designated by the Secretary of State following notification of any rule to him by any body regulating a professional service<sup>5</sup> or the persons who provide, or wish to provide, that service<sup>6</sup>. Insolvency services<sup>7</sup> are such a professional service<sup>8</sup>.

Conduct on the part of one or more undertakings which amounts to the abuse of a dominant position<sup>9</sup> in a market and which may affect trade within the United Kingdom is prohibited<sup>10</sup>.

Agreements and conduct are not prohibited to the extent that they are made or engaged in in order to comply with a legal requirement<sup>11</sup>.

1 For the meaning of 'agreement', 'decision' and 'practice' see the Competition Act 1998 s 2(2); and COMPETITION vol 18 (2009) PARA 116.

2 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706 preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom.

3 See the Competition Act 1998 s 2(1), (4); and COMPETITION vol 18 (2009) PARA 116. The Competition Act 1998 entered fully into force on 1 March 2000: see the Competition Act 1998 (Commencement No 5) Order 2000, SI 2000/344. On the same date the Insolvency Act 1986 s 428(1), (2) (exemption from the Restrictive Practices Act 1976) was repealed: Competition Act 1998 (Transitional, Consequential and Supplemental Provisions) Order 2000, SI 2000/311, art 19(1), (2).

4 See the Competition Act 1998 s 3(1)(d), Sch 4 para 1(1).

5 For the meaning of 'professional service' see *ibid* Sch 4 para 1(2), Sch 4 Pt II.

6 See *ibid* Sch 4 paras 1(2), 2, 3.

7 For these purposes, 'insolvency services' means the services of persons acting as insolvency practitioners: Insolvency Act 1986 s 428(3) (amended by the Competition Act 1998 (Transitional, Consequential and Supplemental Provisions) Order 2000, SI 2000/311, art 19(1), (2)).

8 See the Competition Act 1998 Sch 4 para 19.

9 For the meaning of 'dominant position' see *ibid* s 18(3); and COMPETITION vol 18 (2009) PARA 125.

10 See *ibid* s 18(1); and COMPETITION vol 18 (2009) PARA 125.

11 See *ibid* ss 3(1)(c), 19(1)(b), Sch 3 para 5; and COMPETITION vol 18 (2009) PARAS 120, 128.

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## **(ii) Requisite Qualification and Means of Obtaining it; Security and Filing Requirements**

### **47. Requisite qualification.**

A person who is not an individual is not qualified to act as an insolvency practitioner<sup>1</sup>; nor is a person qualified to act as an insolvency practitioner at any time<sup>2</sup> unless at that time:

- 66 (1) he is authorised so to act by virtue of membership of a recognised professional body<sup>3</sup>, being permitted so to act by or under the rules of that body<sup>4</sup>; or
- 67 (2) he holds an authorisation granted<sup>5</sup> by a competent authority<sup>6</sup>.

A person is not qualified to act as an insolvency practitioner in relation to another person at any time unless:

- 68 (a) there is in force at that time security or, in Scotland, caution for the proper performance of his functions; and
- 69 (b) that security or caution meets the prescribed requirements with respect to his so acting in relation to that other person<sup>7</sup>.

A person is not qualified to act as an insolvency practitioner at any time if at that time:

- 70 (i) he has been adjudged bankrupt or sequestration of his estate has been awarded and, in either case, he has not been discharged<sup>8</sup>;
- 71 (ii) he is subject to a disqualification order or a disqualification undertaking<sup>9</sup>; or
- 72 (iii) he is a patient within the meaning of the Mental Health Act 1983<sup>10</sup> or the Mental Health (Scotland) Act 1984<sup>11</sup>.

1 Insolvency Act 1986 s 390(1). For the meaning of 'act as an insolvency practitioner' see para 43 ante. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 390 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

2 Where an individual began to act as an insolvency practitioner in relation to any person before 29 December 1986 (see para 2 ante), nothing in the Insolvency Act 1986 s 390(2) or (3) (see *infra*) prevents that individual from being qualified to act as an insolvency practitioner in relation to that person: s 437, Sch 11 para

21. 'Person' includes a body of persons corporate or unincorporate: Interpretation Act 1978 ss 5, 22(1), 23(1), Sch 1, Sch 2 para 4(1)(a).

3 le a professional body recognised under the Insolvency Act 1986 s 391: see para 48 post. For the meaning of 'membership of a professional body' for these purposes see para 48 note 3 post.

4 Ibid s 390(2)(a).

5 le under ibid s 393: see para 50 post.

6 Ibid s 390(2)(b). For the meaning of 'competent authority' for these purposes see para 49 post.

7 Ibid s 390(3). As to the prescribed requirements in relation to security or caution see para 54 post.

8 As to bankruptcy orders see para 195 et seq post; and as to discharge from bankruptcy see para 629 et seq post.

9 le made or accepted under the Company Directors Disqualification Act 1986: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1107 et seq.

10 le under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended): see MENTAL HEALTH vol 30(2) (Reissue) para 681.

11 Insolvency Act 1986 s 390(4) (amended by the Insolvency Act 2000 s 8, Sch 4 para 16(1), (2)). The provision, in relation to Scotland, is the Mental Health (Scotland) Act 1984 s 125(1).

## UPDATE

### 47 Requisite qualification

TEXT AND NOTES 1-6--Also head (3) he holds an authorisation granted by the Department of Enterprise, Trade and Investment for Northern Ireland under the Insolvency (Northern Ireland) Order 1989, SI 1989/2405, art 352: Insolvency Act 1986 s 390(2)(c) (added by SI 2009/3081).

TEXT AND NOTES 8-11--Head (iv) a bankruptcy restrictions order (see PARA 646A.1) is in force in respect of him: Insolvency Act 1986 s 390(5) (added by the Enterprise Act 2002 Sch 21 para 4).

TEXT AND NOTE 11--Insolvency Act 1986 s 390(4) further amended: Mental Capacity Act 2005 Sch 6 para 31(3), Sch 7; Tribunals, Courts and Enforcement Act 2007 Sch 20 para 6; SI 2009/1941.

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### 48. Recognised professional bodies.

The Secretary of State may by order declare a body which appears to him to fulfil the statutory requirements<sup>1</sup> to be a recognised professional body for the following purposes<sup>2</sup>. A body may be so recognised if it regulates the practice of a profession and maintains and enforces rules for securing that such of its members<sup>3</sup> as are permitted by or under the rules to act as insolvency practitioners<sup>4</sup> are fit and proper persons so to act and meet acceptable requirements as to education and practical training and experience<sup>5</sup>.

An order so made in relation to a professional body may be revoked by a further order if it appears to the Secretary of State that the body no longer falls within the above requirements<sup>6</sup>.

An order of the Secretary of State under the above provisions has effect from such date as is specified in the order; and any such order revoking a previous order may make provision whereby members of the body in question continue to be treated as authorised to act as insolvency practitioners for a specified period after the revocation takes effect<sup>7</sup>.

1 le the requirements of the Insolvency Act 1986 s 391(2): see *infra*.

2 Ibid s 391(1). The bodies declared to be recognised professional bodies for the purposes of s 391 with effect from and including 10 November 1986 are: The Chartered Association of Certified Accountants; The Insolvency Practitioners Association; The Institute of Chartered Accountants in England and Wales; The Institute of Chartered Accountants in Ireland; The Institute of Chartered Accountants of Scotland; The Law Society; and The Law Society of Scotland: Insolvency Practitioners (Recognised Professional Bodies) Order 1986, SI 1986/1764, art 2, Schedule (made under the Insolvency Act 1985 ss 3(2), 10 (repealed) and having effect as if made under the Insolvency Act 1986 s 391(1), (4) by virtue of s 437, Sch 11 para 23 (see para 2 note 3 head (1) *ante*); the Interpretation Act 1978 s 17(2)(b)).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 391 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 *et seq post*.

3 For these purposes, references to members of a recognised professional body are to persons who, whether members of that body or not, are subject to its rules in the practice of the profession in question; and the reference in the Insolvency Act 1986 s 390(2) (see para 47 *ante*) to membership of a professional body recognised under s 391 is to be read accordingly: s 391(3).

4 For the meaning of 'act as an insolvency practitioner' see para 43 *ante*.

5 Insolvency Act 1986 s 391(2).

6 Ibid s 391(4).

7 Ibid s 391(5).

## UPDATE

### 48 Recognised professional bodies

TEXT AND NOTES--The Secretary of State may by order require a person or body to pay a fee in connection with the grant or maintenance of a designation of that person or body as a competent authority under the Insolvency Act 1986 s 251U (see PARA 123B), and may refuse to grant, or may withdraw, any such designation where a fee is not paid: s 415A(A1) (s 415A added by the Enterprise Act 2002 s 270(1); amended by Tribunals, Courts and Enforcement Act 2007 Sch 20 para 9). The Secretary of State may by order require a body to pay a fee in connection with the grant or maintenance of recognition of the body under the Insolvency Act 1986 s 391, and may refuse recognition, or revoke an order of recognition under s 391(1) by a further order, where a fee is not paid: s 415A(1). An order made by virtue of s 415A(1) may relate to the maintenance of recognition or authorisation granted before s 415A comes into force: 2002 Act s 270(2). The Secretary of State may by order require a person to pay a fee in connection with the grant or maintenance of authorisation of the person under the 1986 Act s 393, and may disregard an application or withdraw an authorisation where a fee is not paid: s 415A(2). The Secretary of State may by order require the payment of fees in respect of the operation of the Insolvency Services Account, and in respect of payments into and out of that account: s 415A(3). As to the Insolvency Services Account see PARA 26. Section 414(3), (5), (6), (7), and (9) apply to fees under s 415A as they apply to fees under s 414 (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004

Reissue) PARA 1106): s 415A(4). In the exercise of her powers under s 415A the Secretary of State has made the Insolvency Practitioners and Insolvency Services Account (Fees) Order 2003, SI 2003/3363 (amended by SI 2004/476, SI 2005/523, SI 2007/133, SI 2008/672, SI 2009/487).

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#### **49. Authorisation by competent authority.**

Application may be made to a competent authority for authorisation to act as an insolvency practitioner<sup>1</sup>; and the competent authorities for this purpose are:

- 73 (1) in relation to a case of any description specified in directions given by the Secretary of State, the body or person so specified in relation to cases of that description; and
- 74 (2) in relation to any other case, the Secretary of State<sup>2</sup>.

The application must:

- 75 (a) be made in such manner as the competent authority may direct;
- 76 (b) contain or be accompanied by such information as that authority may reasonably require for the purpose of determining the application<sup>3</sup>; and
- 77 (c) be accompanied by the prescribed fee<sup>4</sup>;

and the authority may direct that notice of the making of the application must be published in such manner as may be specified in the direction<sup>5</sup>.

At any time after receiving the application and before determining it, the authority may require the applicant to furnish additional information<sup>6</sup>.

Directions and requirements given or imposed under the above provisions<sup>7</sup> may differ as between different applications<sup>8</sup>; and any information to be furnished to the competent authority under the above provisions must, if it so requires, be in such form or verified in such manner as it may specify<sup>9</sup>.

An application may be withdrawn before it is granted or refused<sup>10</sup>.

1 Insolvency Act 1986 s 392(1). For the meaning of 'act as an insolvency practitioner' see para 43 ante. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 392 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

2 Insolvency Act 1986 s 392(2). At the date at which this volume states the law no directions had been so given by the Secretary of State.

3 As to the grounds for granting or refusing authorisation see para 50 post.

4 The prescribed fee is: (1) in a case where at the relevant time the applicant is the holder of an authorisation, £100; in any other case, £200: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 9. For these purposes, 'relevant time', in relation to an individual making an application or his application, means the time of making the application: reg 1(3). Any sums received under the Insolvency Act 1986 s 392 by a



competent authority other than the Secretary of State may be retained by the authority; and any sums so received by the Secretary of State must be paid into the Consolidated Fund: s 392(8). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 711.

5 Ibid s 392(3).

6 Ibid s 392(4).

7 Ie under ibid s 392(3) or (4): see supra.

8 Ibid s 392(5).

9 Ibid s 392(6).

10 Ibid s 392(7).

## UPDATE

### 49-57 Authorisation by competent authority ... Withdrawal of authorisation

SI 1990/439 (as amended) replaced by the Insolvency Practitioners Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

### 49 Authorisation by competent authority

TEXT AND NOTE 4--Head (c) does not have effect in respect of an application made to the Secretary of State but this is without prejudice to s 415A (see PARA 48): Insolvency Act 1986 s 392(9) (added by the Enterprise Act 2002 s 270(3)).

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### 50. Grant and refusal of authorisation.

The competent authority may, on an application duly made<sup>1</sup> and after being furnished with all such information as it may so require, grant or refuse the application<sup>2</sup>. The authority must, however, grant the application if it appears to it from the information furnished by the applicant and having regard to such other information, if any, as it may have:

- 78 (1) that the applicant is a fit and proper person to act as an insolvency practitioner<sup>3</sup>; and
- 79 (2) that the applicant meets the prescribed requirements with respect to education and practical training and experience<sup>4</sup>.

An authorisation granted under the above provisions, if not previously withdrawn<sup>5</sup>, continues in force for such period not exceeding the prescribed maximum<sup>6</sup> as may be specified in the authorisation<sup>7</sup>.

1 Ie in accordance with the Insolvency Act 1986 s 392: see para 49 ante.

2 Ibid s 393(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 393 applies: Administration of Insolvent Estates of

Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

3 As to the matters to be taken into account for determining whether an applicant is fit and proper to act as an insolvency practitioner see para 51 post. For the meaning of 'act as an insolvency practitioner' see para 43 ante.

4 Insolvency Act 1986 s 393(2). As to the prescribed requirements with respect to education and practical training and experience see paras 52, 53 respectively post.

Applications made by an individual to the competent authority on or after 29 December 1986 (see para 2 ante) for authorisation under s 393 to act as an insolvency practitioner and any withdrawal of an authorisation granted by a competent authority under the Insolvency Act 1985 s 5 (repealed) pursuant to a notice under the Insolvency Act 1986 s 394(2) (see para 58 post) on or after 29 December 1986 were governed by the Insolvency Practitioners Regulations 1986, SI 1986/1995, Pt II (regs 2-8) (revoked): reg 3 (revoked). The Insolvency Practitioners (Authorisation by Relevant Authorities) Regulations 1986, SI 1986/951, were revoked, save that they continued to apply and have effect in relation to any application made to a relevant authority before 29 December 1986 for authorisation under the Insolvency Act 1985 s 5 (repealed) to act as an insolvency practitioner in respect of which: (1) no authorisation had been granted; or (2) no written notice under s 8(4) (repealed) had been given by the relevant authority; (3) no written notice under s 9 (repealed) had been given by the authority, before 29 December 1986: Insolvency Practitioners Regulations 1986, SI 1986/1995, reg 2 (revoked).

Applications made to a competent authority on or after 1 April 1990 for authorisation under the Insolvency Act 1986 s 393 to act as an insolvency practitioner and any withdrawal of an authorisation pursuant to a notice under s 394(2) (see para 58 post) given on or after that date are governed by the Insolvency Practitioners Regulations 1990, SI 1990/439: reg 3. Notwithstanding the revocation of the Insolvency Practitioners Regulations 1986, SI 1986/1995, by the Insolvency Practitioners Regulations 1990, SI 1990/439, the 1986 Regulations continue to apply and have effect in relation to: (a) any application made before 1 April 1990 in respect of which no authorisation had been granted, or no written notice under the Insolvency Act 1986 s 397(2) had been given by the competent authority, or no written notice under s 398 had been given by the authority, before 1 April 1990; or (b) any withdrawal of an authorisation pursuant to a notice under s 394(2) given before 1 April 1990: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 2(2).

The Insolvency Practitioners Regulations 1986, SI 1986/1995, other than Pt II (regs 2-8), and the Insolvency Practitioners (Amendment) Regulations 1986, SI 1986/2247, continue to apply and have effect in relation to any person appointed to act as an insolvency practitioner in relation to any person before 1 April 1990 in so far as he continues to act in relation to that person on or after 1 April 1990 pursuant to that appointment or to a subsequent appointment to act as an insolvency practitioner within the scope of the Insolvency Practitioners Regulations 1986, SI 1986/1995, reg 11 (revoked) made on or after 1 April 1990: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 2(3).

As to the power of the Secretary of State to make regulations concerning insolvency practitioners see the Insolvency Act 1986 s 419; and para 753 post.

5 See para 49 ante.

6 The prescribed maximum is three years from the date on which the authorisation is granted: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 10.

7 Insolvency Act 1986 s 393(3).

## UPDATE

### 49-57 Authorisation by competent authority ... Withdrawal of authorisation

SI 1990/439 (as amended) replaced by the Insolvency Practitioners Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

### 50 Grant and refusal of authorisation

TEXT AND NOTES 5-7--An authorisation now, if not previously withdrawn, continues in force for one year: Insolvency Act 1986 s 393(3) (substituted by SI 2009/3081). But where an authorisation is granted the competent authority must, before its expiry (and without a further application) grant a further authorisation taking effect immediately

after the expiry of the previous authorisation, unless it appears to the authority that the subject of the authorisation no longer complies with s 393(2): Insolvency Act 1986 s 393(3A) (added by SI 2009/3081).

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## **51. Matters for determining whether an applicant is fit and proper.**

In determining whether an applicant<sup>1</sup> is a fit and proper person to act as an insolvency practitioner<sup>2</sup>, the matters to be taken into account<sup>3</sup> include:

- 80 (1) whether the applicant has been convicted of any offence involving fraud or other dishonesty or violence;
- 81 (2) whether the applicant has contravened any provision in any enactment contained in the insolvency legislation<sup>4</sup> or in subordinate legislation made under any such enactment or any provision of the law of a country or territory outside Great Britain which corresponds to such legislation;
- 82 (3) whether the applicant has engaged in any practices in the course of carrying on business<sup>5</sup> appearing to be deceitful or oppressive or otherwise unfair or improper, whether unlawful or not, or which otherwise cast doubt on his probity or competence for discharging the duties of an insolvency practitioner<sup>6</sup>;
- 83 (4) whether, in respect of any insolvency practice<sup>7</sup> carried on by the applicant at the date of or at any time prior to the making of the application<sup>8</sup>, there were established adequate systems of control of the practice and adequate records relating to the practice, including accounting records, and whether such systems of control and records have been or were maintained on an adequate basis;
- 84 (5) whether the insolvency practice of the applicant is, has been or, where the applicant is not yet carrying on such a practice, will be, carried on with the independence, integrity and the professional skills appropriate to the range and scale of the practice and the proper performance of the duties of an insolvency practitioner;
- 85 (6) whether the applicant, in any case where he has acted as an insolvency practitioner, has failed to disclose fully to such persons as might reasonably be expected to be affected thereby circumstances where there is or appears to be a conflict of interest between his so acting and any interest of his own whether personal, financial or otherwise without having received such consent as might be appropriate to his acting or continuing to act despite the existence of such circumstances<sup>9</sup>.

1 For these purposes, 'applicant' includes, where it is proposed to withdraw any authorisation on the grounds that the holder is not a fit and proper person (see para 57 post), the holder of the authorisation: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 4(2).

2 For the meaning of 'act as an insolvency practitioner' see para 43 ante; and notes 6, 7 infra.

3 I.e. without prejudice to the generality of the Insolvency Act 1986 s 393(2)(a) (see para 50 head (1) ante) or s 393(4)(a) (see para 57 head (1) post).

4 For these purposes, 'the insolvency legislation' means the following enactments: the Insolvency Act 1986; the Insolvency Act 1985; the Companies Act 1985 Pts XVIII-XXI (ss 462-674) (as amended); the Bankruptcy Act 1914; the Deeds of Arrangement Act 1914; the Bankruptcy (Scotland) Act 1985; the Bankruptcy (Scotland) Act 1913; the provisions of the enactments repealed by the Companies Consolidation (Consequential Provisions) Act 1985 Sch 1 relating to insolvency; the Pension Schemes Act 1993 Pt VII Ch II (ss 123-127) (as amended); and the Employment Rights Act 1996 Pt XII (ss 182-190) (as amended): Insolvency Practitioners Regulations 1990, SI 1990/439, reg 1(3); Interpretation Act 1978 s 17(2)(a).

5 For these purposes, 'business' includes the carrying on of any trade, profession or vocation and the discharge of the functions relating to any office or employment: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 1(3).

6 For these purposes, 'insolvency practitioner' is to be construed in accordance with the Insolvency Act 1986 s 388 (as amended) (see para 43 ante): Insolvency Practitioners Regulations 1990, SI 1990/439, reg 1(3).

7 For these purposes, 'insolvency practice' means the carrying on of the business of acting as an insolvency practitioner or in a corresponding capacity under the law of any country or territory outside Great Britain; and, for this purpose, acting as an insolvency practitioner includes acting as a trustee in sequestration or a judicial factor on the bankrupt estate of a deceased person: *ibid* reg 1(3).

8 For these purposes, 'application' means an application made by an individual to the competent authority for authorisation under the Insolvency Act 1986 s 393 (see para 50 ante) to act as an insolvency practitioner: Insolvency Practitioners Regulations 1990, SI 1990/439 reg 1(3).

9 *Ibid* reg 4(1).

## UPDATE

### 49-57 Authorisation by competent authority ... Withdrawal of authorisation

SI 1990/439 (as amended) replaced by the Insolvency Practitioners Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

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## 52. Education.

The prescribed requirements in respect of education<sup>1</sup> are:

- 86 (1) that the applicant possesses<sup>2</sup> at the relevant time one or more of the specified academic qualifications<sup>3</sup> or such other academic or professional qualifications as indicate the attainment of an equivalent level of education to that attested by that qualification or, as the case may be, those qualifications<sup>4</sup>;
- 87 (2) that at the relevant time the applicant has passed<sup>5</sup> the Joint Insolvency Examination or has acquired in, or been awarded in, a country or territory outside the United Kingdom professional or vocational qualifications which indicate that the applicant has the knowledge and competence that is attested by a pass in that examination<sup>6</sup>.

1 *Ie* for the purposes of the Insolvency Act 1986 s 393(2)(b): see para 50 head (2) ante.

2 *Ie* in the case of all applicants, other than an applicant who was born on or before 15 December 1951 or at the relevant time is the holder of an authorisation to act as an insolvency practitioner. For the meaning of 'relevant time' see para 49 note 4 ante.

3 The specified academic qualifications are: (1) a degree (other than an honorary degree) conferred by a university in the United Kingdom or Republic of Ireland or by the Council for National Academic Awards or by any institution which may from time to time be specified by Order of the Privy Council under the Further and Higher Education Act 1992 s 76(1) (see EDUCATION vol 15(2) (2006 Reissue) para 727) or the Further and Higher Education (Scotland) Act 1992 s 48(1); (2) a General Certificate of Education ('GCE'), a General Certificate of Secondary Education ('GCSE') or a Scottish Certificate of Education ('SCE') from a specified authority in five subjects which must include: (a) English language or English passed at Ordinary level or Ordinary Grade or Standard Grade at an appropriate grade or at Advanced Level or Higher Grade; (b) two subjects passed at Advanced Level or Higher Grade at an appropriate grade in one sitting; (c) two subjects passed at Ordinary level or Ordinary Grade or Standard Grade at appropriate grades or at Advanced Level or Higher Grade: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 6, Sch 1 Pt I paras 1, 2 (amended by SI 1993/221).

The authorities so specified are: Associated Examining Board; University of Cambridge Local Examinations Syndicate; University of Durham; Joint Matriculation Board; University of London; Department of Education or Ministry of Education, Northern Ireland; Northern Ireland General Certificate of Education Examinations Board; Oxford and Cambridge Schools Examination Board; University of Oxford Delegacy of Local Examinations; Southern Universities' Joint Board for Schools Examinations; Welsh Joint Education Committee; Scottish Examination Board: Insolvency Practitioners Regulations 1990, SI 1990/439, Sch 1 Pt II.

The appropriate grades are: (i) for certificates issued from 1975 onwards, GCSE or GCE Ordinary level passes, A, B, C; SCE Ordinary Grade passes, up to and including 1985, A, B and C and, from 1986, 1, 2 and 3; SCE Standard Grade passes 1, 2 and 3; Advanced level passes A, B, C, D and E; Higher Grade passes A, B and C; (ii) for certificates issued before 1975, the grades which, in relation to the Level or Grade of pass in question, are equivalent to those specified supra in relation to that Level or Grade of pass: Sch 1 Pt 1 para 2, note (i), (ii).

4 Ibid regs 5(1), (2), 6.

5 In the case of all applicants, other than an applicant who or at the relevant time is the holder of an authorisation to act as an insolvency practitioner and has been appointed an office-holder in at least one case under the law of England and Wales or Scotland or has acquired not less than 500 hours of higher insolvency work experience within the period of three years immediately prior to the relevant time. In determining whether an applicant falls within that requirement, the provisions of *ibid* reg 8(2) (see para 53 post) apply: reg 5(3).

6 Ibid regs 5(1), (3), 7.

## UPDATE

### 49-57 Authorisation by competent authority ... Withdrawal of authorisation

SI 1990/439 (as amended) replaced by the Insolvency Practitioners Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

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### 53. Practical training and experience.

The prescribed requirements with respect to practical training and experience<sup>1</sup> are that an applicant must<sup>2</sup> either:

- 88 (1) have been appointed an office-holder<sup>3</sup> in not less than 30 cases within the period of ten years immediately prior to the relevant time or have been first employed by a person carrying on insolvency practice<sup>4</sup> in that practice not later than ten years prior to the relevant time; and
- 89 (2) within the period of ten years referred to in head (1) above, have acquired not less than 7,000 hours of insolvency work experience<sup>5</sup> whether in the

employment of a person carrying on an insolvency practice or as an office-holder;  
and

90 (3) satisfies one of the following three requirements:

7

9. (a) he has been appointed an office-holder in at least five cases within the period of five years immediately prior to the relevant time; or
10. (b) he has acquired 1,000 hours or more of higher insolvency work experience<sup>6</sup> within such period; or
11. (c) he can show that within such period he has achieved one of the following combinations of appointments as an office-holder and hours acquired of higher insolvency work experience: not less than four cases and 200 hours; not less than three cases and 400 hours; not less than two cases and 600 hours; or not less than one case and 800 hours<sup>7</sup>.

8

In determining whether an applicant falls within the above provisions:

- 91 (i) no account is to be taken of any case where he was appointed to the office of receiver or to a corresponding office under the law of a country or territory outside Great Britain by or on behalf of a creditor who at the time of appointment was an associate<sup>8</sup> of the applicant or, in a members' voluntary winding up or in a corresponding procedure under the laws of a country or territory outside Great Britain, he was appointed liquidator at a general meeting where his associates were entitled to exercise or control the exercise of one-third or more of the voting power at that general meeting;
- 92 (ii) where the applicant has been an office-holder in relation to two or more companies which were associates at the time of appointment, or two or more individuals who were carrying on business in partnership with each other at the time of appointment, he is to be treated as having held office in only one case in respect of all offices held in relation to the companies which were associates or in respect of all offices held in relation to the individuals who were in partnership, as the case may be<sup>9</sup>.

1    le for the purposes of the Insolvency Act 1986 s 393(2)(b): see para 50 head (2) ante.

2    le in the case of all applicants, other than an applicant who at the relevant time is the holder of an authorisation to act as an insolvency practitioner and has been appointed an office-holder in at least one case under the law of England and Wales or Scotland or has acquired not less than 500 hours of higher insolvency work experience within the period of three years immediately prior to the relevant time. For the meaning of 'relevant time' see para 49 note 4 ante; and for the meaning of 'office-holder' see note 3 infra.

3    For these purposes, 'office-holder' means a person who acts or has acted as an insolvency practitioner, a trustee in sequestration, or a judicial factor on the bankrupt estate of a deceased person or in a corresponding capacity under the law of any country or territory outside Great Britain: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 1(3). The reference to an insolvency practitioner is to be construed in accordance with the Insolvency Act 1986 s 388 (as amended) (see para 43 ante) but without regard to s 388(5) (as substituted); and references to an office-holder who has been appointed or to a person who has been appointed an office-holder include the official receiver in any case where the official receiver is or has been an office-holder, whether by virtue of his office or otherwise: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 8(5).

4    For the meaning of 'insolvency practice' see para 51 note 7 ante. For these purposes, employment by a person carrying on insolvency practice includes Crown employment in the Insolvency Service of the Department of Trade and Industry (ibid reg 8(4)); and a person carrying on insolvency practice includes a firm or partnership (reg 8(6)). 'Crown employment' is to be construed in accordance with the Trade Union and Labour Relations (Consolidation) Act 1992 s 273(3) (see EMPLOYMENT vol 40 (2009) PARA 848 note 3): Insolvency Practitioners Regulations 1990, SI 1990/439, reg 1(3); Interpretation Act 1978 s 17(2)(b).

5 For these purposes, 'insolvency work experience' means engagement in work related to the administration of the estates of persons in respect of which an office-holder has been appointed: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 1(3).

6 For these purposes, 'higher insolvency work experience' means engagement in work related to the administration of the estates of persons in respect of which an office-holder has been appointed where the work involves the management or supervision of the conduct of a case on behalf of that office-holder: *ibid* reg 1(3).

7 *Ibid* regs 5(3), 8(1), (2). Where, in order to satisfy all or any of the requirements set out in reg 8(1), an applicant relies on appointment as an office-holder or the acquisition of insolvency work experience or higher insolvency work experience in relation to cases under the laws of a country or territory outside Great Britain, he must demonstrate that he has no less than 1,400 hours of insolvency work experience or higher insolvency work experience in cases under the law of England and Wales or Scotland acquired within the period of the two years immediately prior to the making of his application; and that, where appropriate, he has a good command of the English language: regs 5(3), 8(3).

8 For these purposes, 'associate' is to be construed in accordance with the Insolvency Act 1986 s 435 (see para 5 ante): Insolvency Practitioners Regulations 1990, SI 1990/439, reg 1(3).

9 *Ibid* regs 5(3), 8(2).

## UPDATE

### 49-57 Authorisation by competent authority ... Withdrawal of authorisation

SI 1990/439 (as amended) replaced by the Insolvency Practitioners Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

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## 54. Requirements for security or caution.

The requirements in respect of security or caution for the proper performance of the functions of an insolvency practitioner<sup>1</sup> are that:

- 93 (1) there is in force at the time when an insolvency practitioner is appointed to act in relation to any person<sup>2</sup> a bond which complies with the specified requirements<sup>3</sup> under which the surety or cautioner is liable in the general penalty sum of £250,000; and
- 94 (2) there is in force in relation to that bond with effect from the time when an insolvency practitioner is appointed to act in relation to any person a specific penalty in respect of the practitioner acting in relation to that person under which the specific penalty sum is not less than the value of that person's estimated assets<sup>4</sup>;
- 95 (3) where, at any time before the practitioner obtains his release or discharge in respect of his acting in relation to that person, he forms the opinion that the value of the assets comprised in the estate of that person is higher than the penalty sum under the current specific penalty<sup>5</sup>, being a penalty sum less than £5,000,000, there is obtained by the practitioner a further specific penalty in respect of his acting in relation to that person under which the penalty sum is at least equal to that higher value or £5,000,000, whichever is the less<sup>6</sup>.

The bond must be retained by the recognised professional body or, as the case may be, the competent authority by which the practitioner has been authorised to act as an insolvency practitioner<sup>7</sup>.

Where an insolvency practitioner who is interim trustee in relation to the estate of any person is subsequently appointed to be permanent trustee in relation to that estate and a specific penalty is obtained in respect of the earlier appointment, it is not necessary for such a specific penalty to be obtained in respect of the subsequent appointment of the practitioner in those circumstances<sup>8</sup>.

1 le for the purposes of the Insolvency Act 1986 s 390(3)(b): see para 47 head (b) ante. For the meaning of 'insolvency practitioner' see para 51 note 6 ante.

Save as provided in the Insolvency Practitioners Regulations 1990, SI 1990/439, reg 2(3) (see para 50 note 4 ante), Pt III (regs 11-15A (as amended): see infra; and paras 55, 56 post) applies in relation to any person appointed on or after 1 April 1990 to act as an insolvency practitioner in relation to any person: reg 11.

2 For the meaning of 'person' see para 47 note 2 ante.

3 For these purposes, the specified requirements are that the bond must be a bond in a form approved by the Secretary of State which contains provision whereby: (1) a surety or cautioner undertakes to be jointly and severally liable with the insolvency practitioner for the proper performance by the practitioner of the duties and obligations imposed on the practitioner by the Insolvency Act 1986 or the Bankruptcy (Scotland) Act 1985 and the subordinate legislation made under those Acts; (2) the liability of the surety or cautioner and the practitioner is in both a general penalty sum and a specific penalty sum in respect of each person in respect of whom the practitioner acts and is limited to a sum equivalent to the losses caused by the fraud or dishonesty of the practitioner, whether acting alone or in collusion with one or more persons, or the fraud or dishonesty of any person or persons committed with the connivance of the practitioner; (3) a bordereau is to be submitted to the surety or cautioner containing an entry completed by the practitioner evidencing the acceptance by the surety or cautioner of liability in respect of the practitioner acting in relation to a particular person in the amount of the specific penalty; and (4) any claims made under the bond are made firstly in respect of the specific penalty sum: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 12(1)(a), Sch 2 Pt I (amended by SI 1993/221).

4 For these purposes:

- 15 (1) subject to head (3) infra, the value of a person's assets is, where the practitioner is appointed to act as an interim receiver, a trustee in bankruptcy, an administrator of the estate of a deceased individual, a supervisor of a voluntary arrangement proposed by an individual and approved under the Insolvency Act 1986 Pt VIII (ss 252-263) or a trustee under a trust deed for creditors, the value at the date of the appointment of the practitioner estimated by him having regard, where appropriate, to the Insolvency Practitioners Regulations 1990, SI 1990/439, reg 12, Sch 2 Pt II para 2 (see infra) (Sch 2 Pt II para 1(a)(i)-(iii), (v), (x));
- 16 (2) in estimating the value of a person's assets, the practitioner must have regard, in a case where the practitioner is appointed to act in any capacity specified in head (1) supra, to the estimated value of those assets disclosed in any statement of affairs in respect of such cases and any comments of creditors or the official receiver on that statement (Sch 2 Pt II para 2(a));
- 17 (3) in any case where the value of a person's assets estimated in accordance with heads (1), (2) supra is less than £5,000, the value of those assets is for these purposes deemed to be £5,000 (Sch 2 Pt II para 3); and
- 18 (4) in any case where the value of a person's assets estimated in accordance with heads (1), (2) supra is more than £5,000,000, the value of those assets for these purposes is deemed to be £5,000,000 (Sch 2 Pt II para 4).

5 For these purposes, 'the current specific penalty' means the specific penalty for the time being in force which has been obtained pursuant to *ibid* reg 12(1)(b) or (c) (see text heads (2), (3) supra), as the case may be: reg 12(2) (amended by SI 1993/221).

6 Insolvency Practitioners Regulations 1990, SI 1990/439, reg 12(1) (amended by SI 1993/221).

7 Insolvency Practitioners Regulations 1990, SI 1990/439, reg 12(3).



8 Ibid reg 13(c) (amended by SI 1993/221). As to the exceptions in relation to requirements for security or caution in the case of companies see the Insolvency Practitioners Regulations 1990, SI 1990/439, reg 13(a), (b), (d); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 20.

## **UPDATE**

### **49-57 Authorisation by competent authority ... Withdrawal of authorisation**

SI 1990/439 (as amended) replaced by the Insolvency Practitioners Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

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### **55. Inspection and retention requirements in England and Wales.**

Where an insolvency practitioner<sup>1</sup> is appointed to act in relation to any person<sup>2</sup>, he must retain a copy of the bordereau containing the entry evidencing the specific penalty obtained by him in respect of that appointment or any further specific penalty obtained by him in respect of so acting and must produce it on demand for inspection to any person reasonably appearing to him to be a creditor of the person to whom he has been appointed, to the person to whom he has been appointed and to the Secretary of State<sup>3</sup>.

The insolvency practitioner must retain the copy of the bordereau containing the entry required to be produced under the above provisions for a period of two years from the date on which he is granted his release or discharge in respect of that appointment<sup>4</sup>.

1 For the meaning of 'insolvency practitioner' see para 51 note 6 ante.

2 For the meaning of 'person' see para 47 note 2 ante.

3 Insolvency Practitioners Regulations 1990, SI 1990/439, reg 14(1) (substituted by SI 1993/221). As to the requirement to submit a bordereau to the authorising authority see para 56 post.

4 Insolvency Practitioners Regulations 1990, SI 1990/439, reg 14(2) (substituted by SI 1993/221).

## **UPDATE**

### **49-57 Authorisation by competent authority ... Withdrawal of authorisation**

SI 1990/439 (as amended) replaced by the Insolvency Practitioners Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

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## 56. Requirement to submit bordereau to authorising authority.

In respect of each calendar month, an insolvency practitioner<sup>1</sup> must submit to the authorising body<sup>2</sup> a copy of the bordereau containing particulars of:

- 96 (1) any appointment during that calendar month to act as insolvency practitioner provided that, where it is not practicable to do so, such particulars may be included in a subsequent bordereau, but no later than the bordereau relating to the second month after the month of appointment;
- 97 (2) any appointment to act as insolvency practitioner in respect of which, during the calendar month, he forms the opinion that the amount of the penalty sum under the current specific penalty must be increased<sup>3</sup>, provided that, where it is not practicable to do so, such particulars may be included in a subsequent bordereau, but no later than the bordereau relating to the second month after the month in which he forms the relevant opinion;
- 98 (3) any appointment to act as insolvency practitioner in respect of which, during that calendar month, he has obtained his release or discharge, provided that, where it is not practicable to do so, such particulars may be included in a subsequent bordereau<sup>4</sup>.

If, in respect of any calendar month, no particulars as specified above are contained in the bordereau, it must nevertheless be supplied to the authorising body with a statement thereon that either there are no such relevant particulars to be supplied or that it is not practicable to supply such particulars, as the case may be<sup>5</sup>.

1 For the meaning of 'insolvency practitioner' see para 51 note 6 ante.

2 For these purposes, the 'authorising body', in relation to any practitioner, is the professional body by virtue of membership of which that practitioner is authorised to act (see para 49 ante), or the competent authority which granted his authorisation (see para 50 ante), whichever the case may be: Insolvency Practitioners Regulations 1990, SI 1990/439, reg 18(1).

3 I.e. in accordance with *ibid* reg 12(1)(c): see para 54 head (3) ante.

4 *Ibid* reg 15A(1) (added by SI 1993/221).

5 Insolvency Practitioners Regulations 1990, SI 1990/439, reg 15A(2) (added by SI 1993/221).

## UPDATE

### 49-57 Authorisation by competent authority ... Withdrawal of authorisation

SI 1990/439 (as amended) replaced by the Insolvency Practitioners Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

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## 57. Withdrawal of authorisation.

An authorisation to act as an insolvency practitioner granted by a competent authority<sup>1</sup> may be withdrawn by the competent authority if it appears to it:

- 99 (1) that the holder of the authorisation is no longer a fit and proper person to act as an insolvency practitioner<sup>2</sup>; or
- 100 (2) without prejudice to head (1) above, that the holder:
- 9
12. (a) has failed to comply with any provision in relation to insolvency practitioners and their qualifications made under the Insolvency Act 1986<sup>3</sup>; or
13. (b) in purported compliance with any such provision, has furnished the competent authority with false, inaccurate or misleading information<sup>4</sup>.
- 10

Any such authorisation may also be withdrawn by the competent authority at the request or with the consent of the holder of the authorisation<sup>5</sup>.

1 I.e. under the Insolvency Act 1986 s 393(1)-(3): see para 50 ante.

2 As to the matters which determine whether a person is fit and proper to act as an insolvency practitioner see para 51 ante. For the purposes of the Insolvency Practitioners Regulations 1990, SI 1990/439, reg 4(1) (see para 51 ante), 'applicant' includes, where it is proposed to withdraw any authorisation on the grounds that the holder is not a fit and proper person, the holder of the authorisation: see reg 4(2); and para 51 note 1 ante.

3 I.e. the Insolvency Act 1986 Pt XIII (ss 388-398) (as amended) or regulations made under Pt XIII (ss 388-398) (as amended) or Pt XV (ss 411-422) (as amended).

4 Ibid s 393(4). As to the application of s 393 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 50 note 2 ante.

5 Ibid s 393(5).

## UPDATE

### 49-57 Authorisation by competent authority ... Withdrawal of authorisation

SI 1990/439 (as amended) replaced by the Insolvency Practitioners Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

### 57 Withdrawal of authorisation

TEXT AND NOTES--Where an authorisation is withdrawn, Insolvency Act 1986 s 393(3A) (see PARA 50) does not require a further authorisation to be granted or, if a further authorisation has already been granted at the time of the withdrawal, the further authorisation is also withdrawn: Insolvency Act 1986 s 393(6) (added by SI 2009/3081).

NOTE 4--Insolvency Act 1986 s 393(4) amended: SI 2009/3081.

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### 58. Notice of grant or proposed refusal or withdrawal of authorisation.

Where a competent authority grants an authorisation<sup>1</sup>, it must give written notice of that fact to the applicant, specifying the date on which the authorisation takes effect<sup>2</sup>; and, where the authority proposes to refuse an application, or to withdraw an authorisation<sup>3</sup>, it must give the applicant or holder of the authorisation written notice of its intention to do so, setting out particulars of the grounds on which it proposes to act<sup>4</sup>. In the case of a proposed withdrawal, the notice must state the date on which it is proposed that the withdrawal should take effect<sup>5</sup>.

1    Ie under the Insolvency Act 1986 s 393: see para 50 ante.

2    Ibid s 394(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 394 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

3    Ie under the Insolvency Act 1986 s 393(4): see para 57 ante.

4    Ibid s 394(2). A notice under s 394(2) must give particulars of the rights exercisable under s 395 (see para 59 post) and s 396 (see para 60 post) by a person on whom the notice is served: s 394(4).

5    Ibid s 394(3).

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## **59. Right to make representations.**

A person on whom a notice is served by the competent authority that it proposes to refuse or withdraw an authorisation<sup>1</sup> may, within 14 days after the date of service, make written representations to the competent authority<sup>2</sup>. The competent authority must have regard to any representations so made in determining whether to refuse the application or withdraw the authorisation, as the case may be<sup>3</sup>.

1    Ie under the Insolvency Act 1986 s 394(2): see para 58 ante.

2    Ibid s 395(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 395 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

3    Insolvency Act 1986 s 395(2).

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## **(iii) Reference to Insolvency Practitioners Tribunal**

### **60. Reference to tribunal.**

Where a person is served with a notice by the competent authority that it proposes to refuse or withdraw an authorisation<sup>1</sup>, he may:

- 101 (1) at any time within 28 days after the date of service of the notice<sup>2</sup>; or
- 102 (2) at any time after the making by him of representations<sup>3</sup> and before the end of the period of 28 days after the date of the service on him of a notice by the competent authority that the authority does not propose to alter its decision in consequence of the representations<sup>4</sup>,

give written notice to the authority requiring the case to be referred to the Insolvency Practitioners Tribunal<sup>5</sup>. Where such a requirement is made, then, unless the competent authority has decided or decides to grant the application or, as the case may be, not to withdraw the authorisation, and, within seven days after the date of the making of the requirement, gives written notice of that decision to the person by whom the requirement was made, it must refer the case to the Insolvency Practitioners Tribunal<sup>6</sup>.

On referring a case to the tribunal, the competent authority must send to the tribunal a copy of the written notice served by it on the applicant<sup>7</sup>, together with a copy of the notification by the applicant that he wishes the case to be referred to the tribunal, and give notice to the applicant of the date on which the case has been referred by it to the tribunal and of the address to which any statement, notice or other document required<sup>8</sup> to be given or sent to the tribunal is to be given or sent<sup>9</sup>. Within 21 days of referring the case to the tribunal, the competent authority must send to the tribunal such further information and copies of such other documents and records as it considers would be of assistance to the tribunal, and must, at the same time, send to the applicant such further information and copies of such other documents and records; or, if there is no such information or copies, the competent authority must within such period notify the tribunal and the applicant to that effect<sup>10</sup>.

1    Ie under the Insolvency Act 1986 s 394(2): see para 58 ante.

2    Ibid s 396(2)(a). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 396 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

3    Ie under the Insolvency Act 1986 s 395: see para 59 ante.

4    Ibid s 396(2)(b).

5    Ibid s 396(2). As to the position where no notice is given requiring the case to be referred see para 75 post. The Insolvency Practitioners Tribunal, which was established under the Insolvency Act 1985 s 8(6), Sch 1 (repealed), continues in being: Insolvency Act 1986 s 396(1). As to the constitution of the Insolvency Practitioners Tribunal see para 72 et seq post.

6    Ibid s 396(3).

7    In the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952 (made under the Insolvency Act 1985 Sch 1 para 4(4) (repealed) and having effect as if made under the Insolvency Act 1986 s 396 by virtue of s 437, Sch 11 para 23 (see para 2 note 3 head (1) ante); the Interpretation Act 1978 s 17(2) (b)), 'the applicant' means an applicant for authorisation under the Insolvency Act 1986 s 393 (see para 50 ante) or, where it is proposed to withdraw an authorisation granted under s 393 (see para 57 ante), the holder of the authorisation: Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 1(2)(b).

8    Ie by the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952: see para 61 et seq post.

9 Ibid r 2(1). As to the powers conferred on the Secretary of State to make rules regulating the procedure before the Insolvency Practitioners Tribunal see para 64 post.

10 Ibid r 2(2).

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## **61. Statement of the applicant.**

Within 21 days after the competent authority has sent to the applicant<sup>1</sup> the material<sup>2</sup> or, as the case may be, after it has sent to him the notification<sup>3</sup>, the applicant must send to the Insolvency Practitioners Tribunal a statement of his grounds for requiring the case to be investigated by the tribunal specifying:

- 103 (1) which matters of fact, if any, contained in the written notice served on him<sup>4</sup> he disputes;
- 104 (2) any other matters which he considers should be drawn to the attention of the tribunal; and
- 105 (3) the names and addresses of any witnesses whose evidence he wishes the tribunal to hear<sup>5</sup>.

The applicant must, on sending such statement to the tribunal, send a copy to the competent authority<sup>6</sup>.

1 For the meaning of 'the applicant' see para 60 note 7 ante.

2 Ie the material mentioned in the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 2(2): see para 60 ante.

3 Ie under ibid r 2: see para 60 ante.

4 Ie under the Insolvency Act 1986 s 394(2): see para 58 ante.

5 Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 3(1). See also para 60 note 7 ante.

6 Ibid r 3(2).

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## **62. Appointment of solicitor and counsel to the tribunal.**

At any time after the case has been referred to it, the Insolvency Practitioners Tribunal may appoint the Treasury Solicitor<sup>1</sup> and counsel, or, in Scottish cases<sup>2</sup>, may request the Treasury Solicitor to appoint a solicitor and may appoint counsel, to exercise the functions of assisting

the tribunal in seeking and presenting evidence in accordance with the requirements of the tribunal, and representing the public interest in relation to the matters before the tribunal<sup>3</sup>.

1 For these purposes, 'Treasury Solicitor' means the Solicitor for the affairs of Her Majesty's Treasury as provided in the Treasury Solicitor Act 1876 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 541): Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 1(2)(c). See also para 60 note 7 ante.

2 For these purposes, 'a Scottish case' means any case where, at the time of the reference of the case to the tribunal, the applicant is either habitually resident in, or has his principal place of business in, Scotland: *ibid* r 1(2)(d).

3 *Ibid* r 4.

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### **63. Investigation by tribunal.**

Where a case has been referred to the Insolvency Practitioners Tribunal<sup>1</sup>, the tribunal must investigate the case, and make a report to the competent authority stating what would in its opinion be the appropriate decision in the matter and the reasons for that opinion; and it is the duty of the competent authority to decide the matter accordingly<sup>2</sup>.

After the receipt of the statement of the applicant<sup>3</sup> or, if no such statement is received, after the expiry of the 21 days in which the applicant must send his statement<sup>3</sup>, the tribunal must investigate the case and make a report by carrying out such inquiries as it thinks appropriate for that purpose into and concerning the information, documents, records and matters placed before it<sup>4</sup>, and, in carrying out such inquiries, the following requirements<sup>5</sup> apply<sup>6</sup>.

1 *Ie* under the Insolvency Act 1986 s 396: see para 60 ante.

2 *Ibid* s 397(1). As to the reports to be made by the tribunal following investigation see para 74 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 397 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

3 See para 61 ante.

4 *Ie* under the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, rr 2, 3: see paras 60, 61 respectively ante.

5 *Ie* *ibid* rr 6-16: see para 64 et seq post.

6 *Ibid* r 5. See also para 60 note 7 ante.

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#### **64. Procedure of and methods of inquiry by the tribunal.**

Any investigation by the Insolvency Practitioners Tribunal must be so conducted as to afford a reasonable opportunity for representations to be made to the tribunal by or on behalf of the person whose case is the subject of the investigation<sup>1</sup>; and the Secretary of State may make rules for regulating the procedure on any investigation by the tribunal<sup>2</sup>.

As soon as practicable after the tribunal has considered the subject matter of the investigation, it must notify the competent authority and the applicant<sup>3</sup> of the manner in which it proposes to conduct its inquiries and, in particular, whether oral evidence is to be taken<sup>4</sup>.

The tribunal must give the competent authority and the applicant a reasonable opportunity of making representations on the manner in which it proposes to conduct its inquiries and such representations may be made orally or in writing at the option of the competent authority or the applicant, as the case may be<sup>5</sup>. After considering any such representations that may be made, the tribunal must notify the competent authority and the applicant whether and, if so, in what respects, it has decided to alter the manner in which it proposes to carry out its inquiries<sup>6</sup>.

If, at any subsequent stage in the investigation, the tribunal proposes to make any material change in the manner in which its inquiries are to be carried out, it must notify the competent authority and the applicant and the above provisions<sup>7</sup> apply accordingly<sup>8</sup>.

1 Insolvency Act 1986 s 396(1), Sch 7 para 4(1). As to the application of s 396 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 60 note 2 ante.

2 Ibid Sch 7 para 4(4). This power is subject to the provisions of Sch 7 para 4(1)-(3), (5) (see supra; and para 65 post): Sch 7 para 4(4).

3 For the meaning of 'the applicant' see para 60 note 7 ante.

4 Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 6(1). See also para 60 note 7 ante. As to the taking of evidence see para 65 post.

5 Ibid r 6(2).

6 Ibid r 6(3).

7 Ie ibid r 6(2), (3): see supra.

8 Ibid r 6(4).

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#### **65. Taking of evidence.**

For the purposes of its investigation<sup>1</sup>, the Insolvency Practitioners Tribunal:

- 106 (1) may by summons require any person to attend, at such time and place as is specified in the summons, to give evidence or to produce any books, papers and other records<sup>2</sup> in his possession or under his control which the tribunal considers it necessary for the purposes of the investigation to examine; and



- 107 (2) may take evidence on oath, and for the purpose administer oaths, or may, instead of administering an oath, require the person examined to make and subscribe a declaration of the truth of the matter respecting which he is examined;

but no person is to be required, in obedience to such a summons, to go more than ten miles from his place of residence, unless the necessary expenses of his attendance are paid or tendered to him<sup>3</sup>.

Every person who:

- 108 (a) without reasonable excuse fails to attend in obedience to a summons issued under the above provisions, or refuses to give evidence; or  
 109 (b) intentionally alters, suppresses, conceals or destroys or refuses to produce any document which he may be required to produce for the purpose of an investigation by the tribunal,

is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>4</sup>.

When, in the carrying out of its inquiries, the tribunal:

- 110 (i) wishes to examine a witness orally, it must give notice to the applicant<sup>5</sup> and the competent authority of the time and place at which the examination will be held, and the applicant and the competent authority are entitled to be present at the examination by the tribunal of any witness and to put such additional questions to him as may appear to the tribunal to be relevant to the subject matter of the investigation; or  
 111 (ii) takes into consideration documentary evidence or evidence in the form of computer or other non-documentary records not placed before the tribunal<sup>6</sup>, the tribunal must give the applicant and the competent authority an opportunity of inspecting that evidence and taking copies or an appropriate record thereof<sup>7</sup>.

1 See paras 63, 64 ante.

2 For the meaning of 'records' see para 21 note 11 ante.

3 Insolvency Act 1986 s 396(1), Sch 7 para 4(2). As to the application of s 396 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 60 note 2 ante.

4 Ibid s 430, Sch 7 para 4(3), Sch 10. 'The standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58(a)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; and level 5, £5,000; Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Powers of Criminal Courts (Sentencing) Act 2000 s 128; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

5 For the meaning of 'the applicant' see para 60 note 7 ante.

6 Ie under the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, rr 2, 3: see paras 60, 61 respectively ante.

7 Ibid r 7. See also para 60 note 7 ante.

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## **66. Final representations.**

After the Insolvency Practitioners Tribunal has completed the taking of such evidence as it considers necessary for the purpose of the investigation<sup>1</sup>, it must give the applicant<sup>2</sup> and the competent authority a reasonable opportunity of making representations on the evidence and on the subject matter of the investigation generally; and such representations may be made orally or in writing at the option of the applicant or, as the case may be, of the competent authority<sup>3</sup>.

1 As to the investigation see paras 63, 64 ante.

2 For the meaning of 'the applicant' see para 60 note 7 ante.

3 Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 8. See also para 60 note 7 ante.

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## **67. Representation at a hearing.**

At the hearing of oral representations or the taking of oral evidence before the Insolvency Practitioners Tribunal, the applicant<sup>1</sup> may be represented by counsel or solicitor, or by any other person allowed by the tribunal to appear on his behalf; and the competent authority may be represented by counsel or solicitor or by any officer of the competent authority<sup>2</sup>.

1 For the meaning of 'the applicant' see para 60 note 7 ante.

2 Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 9. See also para 60 note 7 ante.

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## **68. Service of written representations.**

Where the competent authority or the applicant<sup>1</sup> makes any written representations to the Insolvency Practitioners Tribunal in the course of its investigation, the competent authority or, as the case may be, the applicant must send a copy of such representations to the other<sup>2</sup>.

1 For the meaning of 'the applicant' see para 60 note 7 ante.

2 Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 10. See also para 60 note 7 ante.

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## **69. Hearings in public or in private.**

The Insolvency Practitioners Tribunal must conduct its investigation in private and, save to the extent that the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986<sup>1</sup> provide for the hearing of oral representations or for the taking of oral evidence and the applicant<sup>2</sup> requests that any such hearing be in public, no person other than those entitled to represent the applicant or the competent authority<sup>3</sup> or having the permission of the tribunal is entitled to be present at any such hearing<sup>4</sup>.

Nothing in the above provisions prevents a member of the Council on Tribunals or of its Scottish Committee<sup>5</sup> from attending in his capacity as such a member any such hearing<sup>6</sup>.

1 I.e. the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952: see para 60 note 7 ante.

2 For the meaning of 'the applicant' see para 60 note 7 ante.

3 I.e. under the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 9: see para 67 ante.

4 Ibid r 11(1). See also para 60 note 7 ante.

5 As to the Council on Tribunals and the Scottish Committee see the Tribunals and Inquiries Act 1992 ss 1-4; and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) paras 55, 56.

6 Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 11(2).

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## **70. Notices and time limits.**

Any notice or other document required by the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986<sup>1</sup> to be given or sent may be given or sent by first-class post<sup>2</sup>.

The Insolvency Practitioners Tribunal may in any investigation permit the competent authority or the applicant<sup>3</sup> to send any document or perform any act after the time prescribed in the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986 for so sending or performing and such permission may be granted after any such time has expired<sup>4</sup>.

1 See the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952: see para 60 note 7 ante.

2 Ibid r 12. See also para 60 note 7 ante.

3 For the meaning of 'the applicant' see para 60 note 7 ante.

4 Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 13.

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## **71. Powers of chairman.**

Anything required or authorised to be done by the Insolvency Practitioners Tribunal in the course of an investigation<sup>1</sup> may be done by the chairman except:

- 112 (1) the settling of the manner in which the tribunal is to conduct its investigation<sup>2</sup>;
- 113 (2) the hearing or consideration of any representations made by the competent authority or the applicant<sup>3</sup>; and
- 114 (3) the taking of evidence, whether orally or in the form of documents or non-documentary records<sup>4</sup>.

1 See para 63 et seq ante.

2 See para 64 ante.

3 For the meaning of 'the applicant' see para 60 note 7 ante.

4 Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 14. See also para 60 note 7 ante. As to the taking of evidence see para 65 ante.

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## **72. Constitution of tribunal.**

The Secretary of State must draw up and from time to time revise<sup>1</sup>:

- 115 (1) a panel of persons who have a seven-year general qualification<sup>2</sup> or are advocates or solicitors in Scotland of at least seven years' standing, and are nominated for the purpose by the Lord Chancellor or the Lord President of the Court of Session<sup>3</sup>; and
- 116 (2) a panel of persons who are experienced in insolvency matters<sup>4</sup>;

and the members of the Insolvency Practitioners Tribunal must be selected from those panels<sup>5</sup>.

The Secretary of State may out of money provided by Parliament pay to members of the tribunal such remuneration as he may, with the approval of the Treasury, determine; and such expenses of the tribunal as the Secretary of State and the Treasury may approve must be defrayed by the Secretary of State out of money so provided<sup>6</sup>.

1 The power to revise the panels includes power to terminate a person's membership of either of them, and is accordingly to that extent subject to the Tribunals and Inquiries Act 1992 s 7 (as amended) (which makes it necessary to obtain the concurrence of the Lord Chancellor and the Lord President of the Court of Session to dismissals in certain cases: see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) para 14); Insolvency Act 1986 s 396(1), Sch 7 para 1(2) (amended by the Tribunals and Inquiries Act 1992 s 18(1), Sch 3 para 19). As to the application of the Insolvency Act 1986 s 396 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 60 note 2 ante.

2 le within the meaning of the Courts and Legal Services Act 1990 s 71 (as amended): see LEGAL PROFESSIONS vol 65 (2008) PARA 763.

3 Insolvency Act 1986 Sch 7 para 1(1)(a) (amended by the Courts and Legal Services Act 1990 s 71(2), Sch 10 para 67).

4 Insolvency Act 1986 Sch 7 para 1(1)(b).

5 Ibid Sch 7 para 1(1). The manner of selection must be in accordance with Sch 7 (as amended): see para 73 post.

6 Ibid Sch 7 para 2.

## UPDATE

### 72 Constitution of tribunal

TEXT AND NOTE 3--Any appointment to the office of member of Insolvency Practitioners Tribunal panel in exercise of the function under the 1986 Act Sch 7 para 1(1)(a) must be made, by virtue of the Constitutional Reform Act 2005 s 85, Sch 14 Pt 3, in accordance with ss 85-93, 96: see COURTS vol 10 (Reissue) PARA 515B.18.

The Lord Chancellor's function under the 1986 Act Sch 7 para 1(1)(a) is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

1986 Act Sch 7 para 1(1)(a) further amended: Tribunals, Courts and Enforcement Act 2007 Sch 10 para 19.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(4) INSOLVENCY PRACTITIONERS AND THEIR QUALIFICATION/(iii) Reference to Insolvency Practitioners Tribunal/73. Sittings of tribunal.

### 73. Sittings of tribunal.

For the purposes of carrying out its functions in relation to any cases referred to it, the Insolvency Practitioners Tribunal may sit either as a single tribunal or in two or more divisions<sup>1</sup>; and the functions of the tribunal in relation to any case referred to it must be exercised by three members consisting of a chairman<sup>2</sup> and two other members<sup>3</sup>.

1 Insolvency Act 1986 s 396(1), Sch 7 para 3(1). As to the application of s 396 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 60 note 2 ante.

2 The chairman must be selected by the Secretary of State from the panel drawn up under *ibid* Sch 7 para 1(1)(a) (as amended) (see para 72 head (1) ante): Sch 7 para 3(2)(a).

3 *Ibid* Sch 7 para 3(2). The two other members must be selected by the Secretary of State from the panel drawn up under Sch 7 para 1(1)(b) (see para 72 head (2) ante): Sch 7 para 3(2)(b).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(4) INSOLVENCY PRACTITIONERS AND THEIR QUALIFICATION/(iii) Reference to Insolvency Practitioners Tribunal/74. Reports by tribunal following investigation.

#### **74. Reports by tribunal following investigation.**

Following a reference to it, the Insolvency Practitioners Tribunal must make a report to the competent authority stating what would in its opinion be the appropriate decision in the matter and the reasons for that opinion<sup>1</sup>. The tribunal must so make its report on the case to the competent authority no later than four months after the date on which the case is referred to it<sup>2</sup> unless the competent authority, on the application of the tribunal, permits the report to be made within such further period as the competent authority may notify in writing to the tribunal<sup>3</sup>.

The competent authority may only permit the report to be made within such further period where it appears to that authority that, through exceptional circumstances, the tribunal will be unable to make its report within the period of four months referred to above<sup>4</sup>.

The tribunal must send a copy of the report to the applicant<sup>5</sup> or, as the case may be, the holder of the authorisation; and the competent authority must serve him with a written notice of the decision made by it in accordance with the report<sup>6</sup>.

The competent authority may, if it thinks fit, publish the report of the tribunal<sup>7</sup>.

1 Insolvency Act 1986 s 397(1)(b). See also para 63 ante. As to the application of s 397 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 63 note 2 ante.

2 *Ie* under *ibid* s 396(3): see para 60 ante.

3 Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, r 15(1). See also para 60 note 7 ante.

4 *Ibid* r 15(2).

5 For the meaning of 'the applicant' see para 60 note 7 ante.

6 Insolvency Act 1986 s 397(2).

7 *Ibid* s 397(3).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(4) INSOLVENCY PRACTITIONERS AND THEIR QUALIFICATION/(iii) Reference to Insolvency Practitioners Tribunal/75. Refusal or withdrawal of authorisation without reference to tribunal.

## **75. Refusal or withdrawal of authorisation without reference to tribunal.**

Where in the case of any proposed refusal or withdrawal of an authorisation the periods within which a person may give written notice to the competent authority requiring the case to be referred to the Insolvency Practitioners Tribunal have expired<sup>1</sup>, the competent authority may give written notice of the refusal or withdrawal to the person concerned<sup>2</sup>.

1 The expiry of the periods referred to is either: (1) the expiry of the period mentioned in the Insolvency Act 1986 s 396(2)(a) (see para 60 head (1) ante) without the making of any requirement under s 396(2)(a) or of any representations under s 395 (see para 59 ante); or (2) where the competent authority has given a notice such as is mentioned in s 396(2)(b) (see para 60 head (2) ante), the expiry of the period there mentioned without the making of any such requirement: s 398(a), (b).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 398 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

2 Insolvency Act 1986 s 398. The written notice of the refusal or withdrawal of the authorisation to the person concerned must be in accordance with the proposal in the notice given under s 394(2) (see para 58 ante): s 398.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(4) INSOLVENCY PRACTITIONERS AND THEIR QUALIFICATION/(iv) Records to be kept by Insolvency Practitioner/76. Records to be kept.

### **(iv) Records to be kept by Insolvency Practitioner**

## **76. Records to be kept.**

In respect of the estate of each person<sup>1</sup> in relation to whom an insolvency practitioner<sup>2</sup> acts in his capacity as such<sup>3</sup> and in respect of the security or caution maintained by the practitioner for the proper performance of his functions in relation to that estate<sup>4</sup>, the practitioner must maintain a record in the prescribed form<sup>5</sup> and must make forthwith on the occurrence of any events specified the appropriate entry in the record<sup>6</sup>. Each record so maintained must be kept in such a way as to be capable of being produced by the insolvency practitioner separately from any other record<sup>7</sup>.

1 For the meaning of 'person' see para 47 note 2 ante.

2 For the meaning of 'insolvency practitioner' see para 51 note 6 ante.

3 Ie in any of the capacities specified in the Insolvency Act 1986 s 388: see para 43 ante.

Save as provided in the Insolvency Practitioners Regulations 1990, SI 1990/439, reg 2(3) (see para 50 note 4 ante), Pt IV (regs 16-20) (see infra; and paras 77-79 post) applies in relation to any person appointed on or after 1 April 1990 to act as an insolvency practitioner in relation to any person: reg 16.

4 Ie in compliance with the Insolvency Act 1986 s 390(3): see paras 47, 54 ante.

5 For the prescribed form of record see the Insolvency Practitioners Regulations 1990, SI 1990/439, reg 17, Sch 3 (amended by SI 1993/221).

6 Insolvency Practitioners Regulations 1990, SI 1990/439, reg 17(1).

7 Ibid reg 17(2).

## **UPDATE**

### **76-79 Records to be kept by Insolvency Practitioner**

SI 1990/439 (as amended) replaced by the Insolvency Practitioner Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(4) INSOLVENCY PRACTITIONERS AND THEIR QUALIFICATION/(iv) Records to be kept by Insolvency Practitioner/77. Inspection of records.

### **77. Inspection of records.**

The records to be maintained by insolvency practitioners<sup>1</sup> must be produced by the insolvency practitioner to the authorising body<sup>2</sup> or any duly appointed representative of such a body on the giving by the body or its representative of reasonable notice to the practitioner<sup>3</sup>.

The records maintained by any insolvency practitioner authorised by virtue of membership of a recognised professional body<sup>4</sup> must be produced by that practitioner to the Secretary of State on the giving by the Secretary of State of reasonable notice to the practitioner<sup>5</sup>.

Where the records are maintained in a non-documentary form, the above references to their production include references to producing a copy of the records in legible form<sup>6</sup>.

1 See para 76 ante. For the meaning of 'insolvency practitioner' see para 51 note 6 ante.

2 For the meaning of 'authorising body' see para 56 note 2 ante.

3 Insolvency Practitioners Regulations 1990, SI 1990/439, reg 18(1).

4 I.e. a body recognised under the Insolvency Act 1986 s 391: see para 48 ante.

5 Insolvency Practitioners Regulations 1990, SI 1990/439, reg 18(2).

6 Ibid reg 18(3).

## **UPDATE**

### **76-79 Records to be kept by Insolvency Practitioner**

SI 1990/439 (as amended) replaced by the Insolvency Practitioner Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(4) INSOLVENCY PRACTITIONERS AND THEIR QUALIFICATION/(iv) Records to be kept by Insolvency Practitioner/78. Notification of place where records maintained.

### **78. Notification of place where records maintained.**



The insolvency practitioner<sup>1</sup> must notify the authorising body<sup>2</sup> of the place where the records required to be maintained<sup>3</sup> are so maintained and the place, if different, where and the manner in which, pursuant to the above provisions<sup>4</sup>, they are to be produced<sup>5</sup>.

1 For the meaning of 'insolvency practitioner' see para 51 note 6 ante.

2 For the meaning of 'authorising body' see para 56 note 2 ante.

3 Ie under the Insolvency Practitioners Regulations 1990, SI 1990/439, Pt IV (regs 16-20): see paras 76, 77 ante; infra; and para 79 post.

4 Ie pursuant to ibid reg 18: see para 77 ante.

5 Ibid reg 19.

## **UPDATE**

### **76-79 Records to be kept by Insolvency Practitioner**

SI 1990/439 (as amended) replaced by the Insolvency Practitioner Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(4) INSOLVENCY PRACTITIONERS AND THEIR QUALIFICATION/(iv) Records to be kept by Insolvency Practitioner/79. Preservation of records.

### **79. Preservation of records.**

The insolvency practitioner<sup>1</sup> must preserve every record required to be maintained<sup>2</sup> for a period of ten years from the date on which the practitioner is granted his release or discharge in respect of that estate or the date on which any security or caution maintained in respect of that estate expired or otherwise ceased to have effect<sup>3</sup>, whichever is the later<sup>4</sup>.

1 For the meaning of 'insolvency practitioner' see para 51 note 6 ante.

2 Ie under the Insolvency Practitioners Regulations 1990, SI 1990/439, Pt IV (regs 16-20): see infra; and para 76 et seq ante.

3 As to requirements to maintain security or caution see para 54 ante.

4 Insolvency Practitioners Regulations 1990, SI 1990/439, reg 20.

## **UPDATE**

### **76-79 Records to be kept by Insolvency Practitioner**

SI 1990/439 (as amended) replaced by the Insolvency Practitioner Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(4) INSOLVENCY PRACTITIONERS AND THEIR QUALIFICATION/ (v) Replacement of Outgoing Insolvency Practitioner/80. Replacement of outgoing insolvency practitioner.

## **(v) Replacement of Outgoing Insolvency Practitioner**

### **80. Replacement of outgoing insolvency practitioner.**

Where an insolvency practitioner ('the outgoing office-holder') holds office as trustee or supervisor in more than one case and dies, retires from practice as an insolvency practitioner or is otherwise unable or unwilling to continue in office, the following provisions apply<sup>1</sup>.

A single application may be made to a judge of the Chancery Division of the High Court by way of ordinary application in the prescribed form<sup>2</sup> for the appointment of a substitute office-holder or office-holders in all cases in which the outgoing office-holder holds office, and for the transfer of each such case to the High Court for the purpose only of making such an order<sup>3</sup>.

The application may be made by any of the following:

- 117 (1) the outgoing office-holder, if he is able and willing to do so;
- 118 (2) any person who holds office jointly with the outgoing office-holder;
- 119 (3) any person who is proposed to be appointed as a substitute for the outgoing office-holder; or
- 120 (4) any creditor in the cases where the substitution is proposed to be made<sup>4</sup>.

The outgoing office-holder, if he is not the applicant, and every person who holds office jointly with the office-holder must be made a respondent to the application; but it is not necessary to join any other person as a respondent or to serve the application on any other person unless the judge or registrar in the High Court so directs<sup>5</sup>.

The application should contain schedules setting out the nature of the office held, the identity of the court currently having jurisdiction over each case and its name and number<sup>6</sup>.

The application must be supported by evidence setting out the circumstances which have given rise to the need to make a substitution and exhibiting the written consent to act of each person who is proposed to be appointed in place of the outgoing office-holder<sup>7</sup>.

The judge will in the first instance consider the application on paper and make such order as he thinks fit; and he may, in particular, do any of the following:

- 121 (a) make an order directing the transfer to the High Court of those cases not already within its jurisdiction for the purpose only of the substantive application;
- 122 (b) if he considers that the papers are in order and that the matter is straightforward, make an order on the substantive application;
- 123 (c) give any directions which he considers to be necessary including, if appropriate, directions for the joinder of any additional respondents or requiring the service of the application on any person or requiring additional evidence to be provided;
- 124 (d) if he does not himself make an order on the substantive application when the matter is first before him, give directions for the further consideration of the substantive application by himself or another judge of the Chancery Division or adjourn the substantive application to the registrar for him to make such order on it as is appropriate<sup>8</sup>.

It is the duty of the applicant to ensure that a sealed copy of every order transferring any case to the High Court and of every order which is made on a substantive application is lodged with the court having jurisdiction over each case affected by such order for filing on the court file relating to that case<sup>9</sup>.

It will not be necessary for the file relating to any case which is transferred to the High Court in accordance with the above provisions to be sent to the High Court unless a judge or registrar so directs<sup>10</sup>.

1 *Practice Direction-Insolvency Proceedings* para 1.6(1).

2 For the prescribed form of ordinary application see the Insolvency Rules 1986, SI 1986/1925, r 12.7(1), (2), Sch 4, Form 7.2.

3 *Practice Direction-Insolvency Proceedings* para 1.6(2).

4 *Ibid* para 1.6(3).

5 *Ibid* para 1.6(4).

6 *Ibid* para 1.6(5).

7 *Ibid* para 1.6(6).

8 *Ibid* para 1.6(7). An order of the kind referred to in para 1.6(7)(i) (see text head (a) *supra*) must follow the draft order in para 1.6(7), Schedule, Form PDIP3 and an order granting the substantive application must follow the draft set out in Schedule, Form PDIP4, subject in each case to such modifications as may be necessary or appropriate: para 1.6(8).

9 *Ibid* para 1.6(9).

10 *Ibid* para 1.6(10).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(i) The Proposal/81. Meaning of 'voluntary arrangement'; 'the proposal'; 'the nominee'; and 'the supervisor'.

## **(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS**

### **(i) The Proposal**

#### **81. Meaning of 'voluntary arrangement'; 'the proposal'; 'the nominee'; and 'the supervisor'.**

A voluntary arrangement under the Insolvency Act 1986<sup>1</sup> is a composition<sup>2</sup> in satisfaction of an individual's debts or a scheme of arrangement<sup>3</sup> of his affairs<sup>4</sup>. For the purposes of the provisions relating to voluntary arrangements<sup>5</sup>, a proposal is a proposal to an individual's creditors which provides for some person ('the nominee') to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation<sup>6</sup>. Once a voluntary arrangement is approved and takes effect, the person supervising its implementation is known as 'the supervisor' of the voluntary arrangement<sup>7</sup>.

1 *Ie* under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 82 *et seq post*.

2 A composition is an agreement between the compounding debtor and all or some of his creditors by which the compounding creditors agree with the debtor, and, expressly or impliedly, with each other, to accept from the debtor payment of less than the amounts due to them in full satisfaction of the whole of their claims: *Re Bradley-Hole (a bankrupt)* [1995] 4 All ER 865 at 886, [1995] 1 WLR 1097 at 1118, 1119. See also *March Estates plc v Gunmark Ltd* [1996] 2 BCLC 1 at 5, [1996] BPIR 439 at 442, 443; *Re Hatton* (1872) 7 Ch App 723 at 726; *Slater v Jones, Capes v Ball* (1873) LR 8 Exch 186 at 193, 194; *Re Griffith* (1886) 3 Morr 111 at 116.

3 A scheme of arrangement does not necessarily involve any compromise or release and this is particularly so for a scheme of arrangement which provides for a moratorium: *March Estates plc v Gunmark Ltd* [1996] 2 BCLC 1, [1996] BPIR 439. A scheme may take any form acceptable to the parties (see *IRC v Adam & Partners Ltd* [2000] BPIR 986, CA); but the usual method is by assignment by the debtor of his property to a trustee for realisation and distribution of the proceeds of sale amongst the creditors rateably or in such proportion as they agree.

4 Insolvency Act 1986 s 253(1). References in Pts VIII-XI (ss 252-385) (as amended) to a person's affairs include his business, if any: s 385(2). For these purposes, except in so far as the context otherwise requires, 'business' includes a trade or profession: s 436. As to the application of s 385 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 6 note 8 ante.

Where insolvency orders are made against an insolvent partnership and an insolvent member of that partnership in his capacity as such, an individual member of that partnership may be the subject of a voluntary arrangement under the Insolvency Act 1986 Pt VIII (ss 252-263): see the Insolvent Partnerships Order 1994, SI 1994/2421, art 5; para 817 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1191 et seq.

5 See note 1 supra.

6 Insolvency Act 1986 s 253(1), (2). As from such day as the Secretary of State may by order made by statutory instrument appoint:

- 19 (1) in s 253(1) after the word 'proposal' there are to be inserted the words 'under this Part, that is, a proposal' (Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 3(a));
- 20 (2) at the end of the Insolvency Act 1986 s 253(2) there are to be inserted the words 'and a nominee must be a person who is qualified to act as an insolvency practitioner, or authorised to act as nominee, in relation to the voluntary arrangement' (Insolvency Act 2000 Sch 3 paras 1, 3(b)).

At the date at which this volume states the law no such day had been appointed.

The Insolvency Rules 1986, SI 1986/1925, Pt 5 (rr 5.1-5.30 (as amended): see para 82 et seq post) apply where a debtor, with a view to an application for an interim order under the Insolvency Act 1986 Pt VIII (ss 252-263), makes a proposal to his creditors for a voluntary arrangement, that is to say, a composition in satisfaction of his debts or a scheme of arrangement of his affairs: Insolvency Rules 1986, SI 1986/1925, r 5.1(1).

7 See the Insolvency Act 1986 s 263(2); and para 108 et seq post. As to the prospective amendment of s 263(2) see para 108 note 4 post.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 81 Meaning of 'voluntary arrangement'; 'the proposal'; 'the nominee'; and 'the supervisor'

NOTE 6--Day now appointed: SI 2002/2711.

SI 1986/1925 Pt 5 (rr 5.1-5.30) does not apply to in relation to voluntary arrangements under the 1986 Act s 263A, in relation to which only SI 1986/1925 Pt 5 Chs 7, 10, 11 and 12 (rr 5.35-5.50, 5.57-5.65) apply: r 5.1(1) (as amended by SI 2003/1730).

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## **82. Who may propose an arrangement; false representations.**

A proposal for a voluntary arrangement<sup>1</sup> may be made by the debtor<sup>2</sup>. The debtor commits an offence if he makes any false representation or commits any other fraud for the purpose of obtaining the approval of his creditors to a proposal for a voluntary arrangement<sup>3</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>4</sup>.

If, for the purpose of obtaining the approval of his creditors to a proposal for a voluntary arrangement, the debtor makes any false representation or fraudulently does, or omits to do, anything, then, even if the proposal is not approved, he commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>5</sup>.

1 For the meaning of 'voluntary arrangement' see para 81 ante.

2 Insolvency Act 1986 s 253(1). As to the prospective amendment of s 253(1) see para 81 note 6 ante. 'The debtor', in relation to a proposal for the purposes of Pt VIII (ss 252-263) (see para 81 ante and para 83 et seq post), means the individual making or intending to make that proposal: s 385(1)(a). As to the application of s 385 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 6 note 8 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 5.30(1).

4 Ibid rr 5.30(2), 12.21, Sch 5. For the meaning of 'the statutory maximum' see para 4 ante.

5 Insolvency Act 1986 s 262A(1)-(3) (added by the Insolvency Act 2000 s 3, Sch 3 paras 1, 12); Insolvency Act 1986 s 430, Sch 10 (amended by the Insolvency Act 2000 Sch 3 paras 1, 16). The Insolvency Act 2000 Sch 3 paras 1, 12, 16 come into force on such day as the Secretary of State may by order made by statutory instrument appoint: s 16(1), (3). At the date at which this volume states the law no such day had been appointed.

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

## **82 Who may propose an arrangement; false representations**

NOTE 2--In relation to a debt relief order or an application for such an order, 'the debtor' has the same meaning as in the Insolvency Act 1986 Pt 7A (see PARA 123B): s 385(1) (amended by the Tribunals, Courts and Enforcement Act 2007 Sch 20 para 5).

NOTE 5--Day now appointed: SI 2002/2711.

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## (ii) Interim Order

### 83. Interim order of court.

In the case of a debtor<sup>1</sup>, being an individual, the court may make an interim order<sup>2</sup> which has the effect that, during the period for which it is in force<sup>3</sup>:

- 125 (1) no bankruptcy petition<sup>4</sup> relating to the debtor may be presented or proceeded with<sup>5</sup>; and
- 126 (2) no other proceedings, and no execution or other legal process<sup>6</sup>, may be commenced or continued against the debtor or his property<sup>7</sup> except with the permission of the court<sup>8</sup>.

1 For the meaning of 'the debtor' see para 82 note 2 ante.

2 See para 84 et seq post.

3 As to the duration of an interim order see para 90 post.

4 As to bankruptcy petitions see para 124 et seq post.

5 Insolvency Act 1986 s 252(1), (2)(a). As from such day as the Secretary of State may by order made by statutory instrument appoint in s 252(2)(a) there is to be inserted after the word 'with':

21 '(aa) no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the debtor in respect of a failure by the debtor to comply with any term or condition of his tenancy of such premises, except with leave of the court':

Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 2(a). At the date at which this volume states the law no such day had been appointed.

6 An interim order cannot impede the operation of a confiscation order granted in criminal proceedings (see *R v Barnet Justices, ex p Phillippou* [1997] BPIR 134, DC) or an application to court by the prosecutor under the Drug Trafficking Act 1994 s 26(7) for the appointment of a receiver of the realisable property of a person against whom criminal proceedings have been instituted (*Re M (Restraint Order)* [1992] QB 377, [1992] 1 All ER 537); cf *Re Rhondda Waste Disposal Ltd* [2001] Ch 57, [2000] 3 WLR 1304, CA. See also *Smith (a bankrupt) v Braintree District Council* [1990] 2 AC 215, [1989] 3 All ER 897, HL.

The words 'execution or other legal process' do not include the remedy of distress by a landlord: see *McMullen & Sons Ltd v Cerrone* [1994] 1 BCLC 152, [1994] BCC 25. Peaceable re-entry by a landlord is also not barred: see *Re a Debtor (No 13A-IO-1995)*, *Re a Debtor (No 14A-IO-1995)* [1996] 1 All ER 691, [1995] 1 WLR 1127.

7 For the meaning of 'property' see para 400 post.

8 Insolvency Act 1986 s 252(1), (2)(b). As from such day as the Secretary of State may by order made by statutory instrument appoint in s 252(2)(b) after the word 'continued' there are to be inserted the words 'and no distress may be levied': Insolvency Act 2000 Sch 3 paras 1, 2(b). At the date at which this volume states the law no such day had been appointed.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### **83 Interim order of court**

NOTE 6--See *Clarke v Coutts & Co* [2002] 26 EG 140 (CS), CA (making of charging order absolute over appellant's property constituted 'other proceedings').

NOTE 8--Day now appointed: SI 2002/2711.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(ii) Interim Order/84. Application for interim order.

### **84. Application for interim order.**

Application to the court for an interim order may be made where the debtor<sup>1</sup> intends to make a proposal<sup>2</sup> to his creditors for a composition in satisfaction of his debts or a scheme of arrangement of his affairs<sup>3</sup>. Except in the case of a bankrupt<sup>4</sup>, an application to the court must be so made to a court in which the debtor would be entitled to present his own petition in bankruptcy<sup>5</sup>. The application must contain sufficient information to establish that it is brought in the appropriate court<sup>6</sup>; and, in the case of a bankrupt, such an application must be made in the court having the conduct of his bankruptcy and must be filed with those bankruptcy proceedings<sup>7</sup>. The application may be made:

- 127 (1) if the debtor is an undischarged<sup>8</sup> bankrupt, by the debtor, the trustee<sup>9</sup> of his estate<sup>10</sup> or the official receiver<sup>11</sup>; and
- 128 (2) in any other case, by the debtor<sup>12</sup>;

but an application may not be made under head (1) above unless the debtor has given notice of the proposal to the official receiver and, if there is one, the trustee of his estate<sup>13</sup>.

An application may not be made while a bankruptcy petition presented by the debtor is pending, if the court has appointed an insolvency practitioner<sup>14</sup> to inquire into the debtor's affairs<sup>15</sup> and report<sup>16</sup>.

An application to the court for an interim order must be accompanied by an affidavit<sup>17</sup> of the following matters:

- 129 (a) the reasons for making the application;
- 130 (b) particulars of any execution or other legal process which, to the debtor's knowledge, has been commenced against him;
- 131 (c) that he is an undischarged bankrupt or, as the case may be, that he is able to petition for his own bankruptcy;
- 132 (d) that no previous application for an interim order has been made by or in respect of the debtor in the period of 12 months ending with the date of the affidavit; and
- 133 (e) that the nominee under the proposal, naming him, is a person who is qualified to act as an insolvency practitioner in relation to the debtor, and is willing to act in relation to the proposal<sup>18</sup>.

A copy of the notice to the intended nominee<sup>19</sup>, indorsed to the effect that he agrees so to act, and a copy of the debtor's proposal given to the nominee, must be exhibited to the affidavit<sup>20</sup>.

On receiving the application and affidavit, the court must fix a venue<sup>21</sup> for the hearing of the application<sup>22</sup>; and the applicant must give at least two days' notice of the hearing:

- 134 (i) where the debtor is an undischarged bankrupt, to the bankrupt, the official receiver and the trustee, whichever of those three is not himself the applicant;
- 135 (ii) in any other case, to any creditor who, to the debtor's knowledge, has presented a bankruptcy petition against him; and
- 136 (iii) in either case, to the nominee who has agreed to act in relation to the debtor's proposal<sup>23</sup>.

1 For the meaning of 'the debtor' see para 82 note 2 ante.

2 le under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 ante; infra; and para 85 et seq post.

3 Ibid s 253(1).

4 For these purposes, 'bankrupt' means an individual who has been adjudged bankrupt and, in relation to a bankruptcy order, it means the individual adjudged bankrupt by that order (ibid s 381(1)); and 'bankruptcy order' means an order adjudging an individual bankrupt (s 381(2)).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 381 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 Insolvency Rules 1986, SI 1986/1925, r 5.5A(1) (added by SI 1987/1919). A debtor's petition may be presented to the court only on the grounds that the debtor is unable to pay his debts: see the Insolvency Act 1986 s 272(1); and para 159 post.

6 Insolvency Rules 1986, SI 1986/1925, r 5.5A(2) (added by SI 1987/1919).

7 Insolvency Rules 1986, SI 1986/1925, r 5.5A(3) (added by SI 1987/1919).

8 As to discharge from bankruptcy see para 629 et seq post.

9 As to the trustee see para 316 et seq post.

10 For these purposes, 'estate', in relation to a bankrupt, is to be construed in accordance with the Insolvency Act 1986 s 283 (as amended) (see para 216 post): s 385(1). As to the application of s 385 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 6 note 8 ante.

11 As to the official receiver see para 31 et seq ante.

12 Insolvency Act 1986 s 253(3).

13 Ibid s 253(4). As from such day as the Secretary of State may by order made by statutory instrument appoint in s 253(4) for the words from 'his proposal' to 'arrangement' there are to be substituted the words 'the proposal': Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 3(c). At the date at which this volume states the law no such day had been appointed.

14 le under the Insolvency Act 1986 s 273: see para 200 post. As to insolvency practitioners and their qualification see para 42 et seq ante; but see also para 81 note 6 head (2) ante.

15 For the meaning of references to a person's affairs see para 81 note 4 ante.

16 Insolvency Act 1986 s 253(5).

17 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

18 Ibid r 5.5(1).



19 For the meaning of 'the nominee' see para 81 ante.

20 Insolvency Rules 1986, SI 1986/1925, r 5.5(2) (amended by SI 1987/1919).

21 For these purposes, references to the venue for any proceeding or attendance before the court, or for a meeting, are to the time, date and place for the proceeding, attendance or meeting: Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.6.

22 Ibid r 5.5(3).

23 Ibid r 5.5(4).

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### **84 Application for interim order**

NOTE 13--Day now appointed: SI 2002/2711.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(ii) Interim Order/85. Effect of application for interim order.

### **85. Effect of application for interim order.**

At any time when an application for an interim order<sup>1</sup> is pending, the court may stay any action, execution or other legal process against the property or person of the debtor<sup>2</sup>. On proof that an application has been so made in respect of that individual, the court may either stay the proceedings or allow them to continue on such terms as it thinks fit<sup>3</sup>.

1 Ie under the Insolvency Act 1986 s 253: see para 84 ante.

2 Ibid s 254(1). For the meaning of 'the debtor' see para 82 note 2 ante. For the prescribed form of order granting a stay pending the hearing of an application for an interim order see the Insolvency Rules 1986, SI 1986/1925, r 12.7(1), (2), Sch 4, Form 5.1 (added by SI 1987/1919). For cases on the meaning of 'execution and other legal process' see para 83 note 6 ante.

As from such day as the Secretary of State may by order made by statutory instrument appoint the Insolvency Act 1986 s 254(1) is amended as follows:

22 (1) after the word 'pending' there is to be inserted:

9. '(a) no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the debtor in respect of a failure by the debtor to comply with any term or condition of his tenancy of such premises, except with leave of the court; and

10. (b)';  
10

23 (2) after the word 'may' there are to be inserted the words 'forbid the levying of any distress on the debtor's property or its subsequent sale or both, and':

Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 4(a), (b). At the date at which this volume states the law no such day had been appointed.

3 Insolvency Act 1986 s 254(2).

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### **85 Effect of application for interim order**

NOTE 2--Day now appointed: SI 2002/2711.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(ii) Interim Order/86. Cases in which interim order may be made.

### **86. Cases in which interim order may be made.**

The court may not make an interim order on an application under the statutory provisions<sup>1</sup> unless it is satisfied:

- 137 (1) that the debtor<sup>2</sup> intends to make a proposal for a voluntary arrangement<sup>3</sup>;
- 138 (2) that, on the day of the making of the application, the debtor was an undischarged bankrupt<sup>4</sup> or was able to petition for his own bankruptcy<sup>5</sup>;
- 139 (3) that no previous application has been made by the debtor for an interim order in the period of 12 months ending with that day<sup>6</sup>; and
- 140 (4) that the nominee<sup>7</sup> under the debtor's proposal to his creditors is a person who is for the time being qualified to act as an insolvency practitioner in relation to the debtor<sup>8</sup>, and is willing to act in relation to the proposal<sup>9</sup>.

The court may make an order if it thinks that it would be appropriate to do so for the purpose of facilitating the consideration and implementation of the debtor's proposal<sup>10</sup>; and, where the debtor is an undischarged bankrupt, the interim order may contain provision as to the conduct of the bankruptcy and the administration of the bankrupt's estate<sup>11</sup>, during the period for which the order is in force<sup>12</sup>. An interim order may not, however, in relation to a bankrupt, make provision relaxing or removing any of the statutory requirements<sup>13</sup> unless the court is satisfied that that provision is unlikely to result in any significant diminution in, or in the value of, the debtor's estate for the purpose of the bankruptcy<sup>14</sup>.

Subject to the statutory provisions<sup>15</sup>, an interim order<sup>16</sup> ceases to have effect at the end of the period of 14 days beginning with the day after the making of the order<sup>17</sup>.

<sup>1</sup> ie under the Insolvency Act 1986 s 253: see para 84 ante.

<sup>2</sup> For the meaning of 'the debtor' see para 82 note 2 ante.

3 Insolvency Act 1986 s 255(1)(a). As to proposals for a voluntary arrangement see para 91 et seq post. As from such day as the Secretary of State may by order made by statutory instrument appoint in s 255(1)(a) for the words 'such a proposal as is mentioned in that section' there are to be substituted the words 'a proposal under this Part': Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 5(a). At the date at which this volume states the law no such day had been appointed.

4 For the meaning of 'bankrupt' see para 84 note 4 ante. As to discharge from bankruptcy see para 629 et seq post.

5 Insolvency Act 1986 s 255(1)(b). A debtor's petition may be presented to the court only on the grounds that the debtor is unable to pay his debts: see s 272(1); and para 159 post.

6 Ibid s 255(1)(c). It is not proper to use the jurisdiction to review under s 375 (as amended) (see para 739 post) to circumvent the prohibition in s 255(1)(c) against second applications for an interim order within a 12-month period: *Hurst v Bennett (No 2)* [2002] BPIR 102.

7 For the meaning of 'the nominee' see para 81 ante.

8 As to insolvency practitioners and their qualification see para 42 et seq ante; but see also para 81 note 6 head (2) ante.

9 Insolvency Act 1986 s 255(1)(d). As from such day as the Secretary of State may by order made by statutory instrument appoint in s 255(1)(d) the words from 'to his creditors' to 'to the debtor, and' are to be omitted: Insolvency Act 2000 Sch 3 paras 1, 5(b). At the date at which this volume states the law no such day had been appointed.

10 Insolvency Act 1986 s 255(2). The exercise of the court's discretion under s 255(2) depends on whether the debtor's proposal is 'serious and viable': *Hook v Jewson Ltd* [1997] 1 BCLC 664, [1997] BCC 752; and see *Re a Debtor (No 103 of 1994)*, *Cooper v Fearnley* [1997] BPIR 20. The fact that the returns on a voluntary arrangement might be small is not, in itself, a good reason for dismissing the application for an interim order out of hand: *Knowles v Coutts & Co* [1998] BPIR 96. The court may refuse to make an interim order where the size of the nominee's fee is excessive: *Re Julie O'Sullivan* [2001] BPIR 534; and see *IRC v Adam & Partners Ltd* [2000] BPIR 986, CA; *Cadbury Schweppes plc v Somji* [2001] 1 WLR 615, sub nom *Somji v Cadbury Schweppes plc* [2001] BCLC 498, CA (there is a requirement of good faith as between competing unsecured creditors and, therefore, secret deals or inducements to one or more creditors to vote in favour of a proposal are prohibited).

11 For the meaning of 'estate' see para 84 note 10 ante.

12 Insolvency Act 1986 s 255(3). Subject to s 255(5), (6) (see *infra*), the provision contained in an interim order by virtue of s 255(3) may include provision staying proceedings in the bankruptcy or modifying any provision in Pts VIII-XI (ss 252-385) (as amended) and any provision of the Insolvency Rules 1986, SI 1986/1925 (as amended) in their application to the debtor's bankruptcy: Insolvency Act 1986 s 255(4).

13 Ie any provision of *ibid* Pts VIII-XI (ss 252-385) (as amended) or of the Insolvency Rules 1986, SI 1986/1925 (as amended)

14 Insolvency Act 1986 s 255(5).

15 Ie *ibid* ss 256-263: see para 90 et seq post.

16 Ie made on application under *ibid* s 253: see para 84 ante.

17 Ibid s 255(6).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 86 Cases in which interim order may be made

NOTES 3, 9--Day now appointed: SI 2002/2711.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(ii) Interim Order/87. Hearing of application for interim order.

### **87. Hearing of application for interim order.**

Any of the persons who have been given notice of the hearing<sup>1</sup> may appear or be represented at the hearing of the application<sup>2</sup>. In deciding whether to make an interim order on the application, the court must take into account any representations made by or on behalf of any of those persons, in particular, whether an order should be made containing provision<sup>3</sup> as to the conduct of the debtor's bankruptcy and the administration of the bankrupt's estate<sup>4</sup>. If the court makes an interim order, it must fix a venue<sup>5</sup> for consideration of the nominee's report; and the date for that consideration must be not later than that on which the interim order ceases<sup>6</sup> to have effect<sup>7</sup>. If, however, an extension of time is granted for filing the nominee's report<sup>8</sup>, the court must, unless there appear to be good reasons against it, correspondingly extend the period for which the interim order has effect<sup>9</sup>.

1    Ie under the Insolvency Rules 1986, SI 1986/1925, r 5.5(4): see para 84 ante.

2    Ibid r 5.6(1). In suitable cases the court will, as a matter of practice, normally be prepared to make an interim order without the attendance of any party, provided that there is no bankruptcy order in existence and, so far as is known, no pending petition: see *Practice Direction-Insolvency Proceedings* para 16.

3    Ie containing such provision as is referred to in the Insolvency Act 1986 s 255(3), (4): see para 86 ante.

4    Insolvency Rules 1986, SI 1986/1925, r 5.6(2). For the meaning of 'estate' see para 84 note 10 ante.

5    For the meaning of 'venue' see para 84 note 21 ante.

6    Ie under the Insolvency Act 1986 s 255(6): see para 90 post.

7    Insolvency Rules 1986, SI 1986/1925, r 5.6(3). As to the duration of an interim order see para 90 post.

8    Ie under the Insolvency Act 1986 s 256(4): see para 96 post.

9    Insolvency Rules 1986, SI 1986/1925, r 5.6(4).

### **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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### **88. Making of interim order.**

Where an interim order is made, at least two sealed copies of the order must be sent by the court forthwith to the person who applied for it; and that person must serve one of the copies on the nominee under the debtor's proposal<sup>1</sup>. The applicant must also forthwith give notice of the making of the order to any person who was given notice of the hearing<sup>2</sup> and was not present or represented at it<sup>3</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 5.7(1). For the meaning of 'the debtor' see para 82 note 2 ante. For the prescribed form of interim order see rr 5.7, 12.7(1), (2), Sch 4, Form 5.2 (added by SI 1987/1919).

<sup>2</sup> I.e. pursuant to the Insolvency Rules 1986, SI 1986/1925, r 5.5(4): see para 84 ante.

<sup>3</sup> Ibid r 5.7(2). If an interim order is not made, there can be no valid voluntary arrangement: *Fletcher v Vooght* [2000] BPIR 435.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 88 Making of interim order

TEXT AND NOTE 1--SI 1986/1925 r 5.7(1) amended, Form 5.2 substituted: SI 2003/1730.

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### 89. Procedure where no interim order made.

Where a debtor<sup>1</sup>, being an individual:

- 141 (1) intends to make a proposal for a voluntary arrangement<sup>2</sup>, but an interim order has not been made<sup>3</sup> in relation to the proposal and no application for such an order is pending; and
- 142 (2) if he is an undischarged bankrupt<sup>4</sup>, has given notice of the proposal to the official receiver and, if there is one, the trustee of his estate,

then, unless a bankruptcy petition presented by the debtor is pending and the court has appointed an insolvency practitioner<sup>5</sup> to inquire into the debtor's affairs and report, the debtor must, for the purpose of enabling the nominee<sup>6</sup> to prepare a report to the court, submit to the nominee:

- 143 (a) a document setting out the terms of the voluntary arrangement which the debtor is proposing; and
- 144 (b) a statement of his affairs containing such particulars of his creditors and of his debts and other liabilities and of his assets as may be prescribed, and such other information as may be prescribed<sup>7</sup>.

If the nominee is of the opinion that the debtor is an undischarged bankrupt, or is able to petition for his own bankruptcy<sup>8</sup>, the nominee must, within 14 days, or such longer period as the court may allow, after receiving the document mentioned in head (a) above, submit a report to the court stating:

- 145 (i) whether, in his opinion, the voluntary arrangement which the debtor is proposing has a reasonable prospect of being approved and implemented;
- 146 (ii) whether, in his opinion, a meeting of the debtor's creditors should be summoned to consider the debtor's proposal; and
- 147 (iii) if, in his opinion, such a meeting should be summoned, the date on which, and time and place at which, he proposes the meeting should be held<sup>9</sup>.

The court may:

- 148 (A) on an application made by the debtor in a case where the nominee has failed to submit the report required by these provisions or has died; or
- 149 (B) on an application made by the debtor or the nominee in a case where it is impracticable or inappropriate for the nominee to continue to act as such,

direct that the nominee is to be replaced as such by another person qualified to act as an insolvency practitioner, or authorised to act as nominee, in relation to the voluntary arrangement<sup>10</sup>.

The court may, on an application made by the nominee, extend the period within which the nominee is to submit his report<sup>11</sup>.

1 For the meaning of 'the debtor' see para 82 note 2 ante.

2 Ie under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 ante; infra; and para 90 et seq post. For the meaning of 'the proposal' see para 81 ante.

3 As to the making of interim orders see para 83 et seq ante.

4 As to discharge from bankruptcy see para 629 et seq post.

5 Ie under the Insolvency Act 1986 s 273: see para 200 post. As to insolvency practitioners and their qualification see para 42 et seq ante; but see also para 81 note 6 head (2) ante.

6 For the meaning of 'the nominee' see para 81 ante.

7 Insolvency Act 1986 s 256A(1), (2) (added by the Insolvency Act 2000 s 3, Sch 3 paras 1, 7). The Insolvency Act 2000 Sch 3 paras 1, 7 come into force on such day as the Secretary of State may by order made by statutory instrument appoint: s 16(1), (3). At the date at which this volume states the law no such day had been appointed.

8 A debtor's petition may be presented to the court only on the grounds that the debtor is unable to pay his debts: see the Insolvency Act 1986 s 272(1); and para 159 post.

9 Ibid s 256A(3) (added by the Insolvency Act 2000 Sch 3 paras 1, 7). See also note 7 supra.

10 Insolvency Act 1986 s 256A(4) (added by the Insolvency Act 2000 Sch 3 paras 1, 7). See also note 7 supra.

11 Insolvency Act 1986 s 256A(5) (added by the Insolvency Act 2000 Sch 3 paras 1, 7). See also note 7 supra.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

## **89 Procedure where no interim order made**

NOTE 7--Day now appointed: SI 2002/2711.

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## **90. Duration of interim order; extension; and discharge.**

An interim order<sup>1</sup> ceases to have effect at the end of the period of 14 days beginning with the day after the making of the order<sup>2</sup>. On an application made by the debtor in a case where the nominee has failed to submit a report<sup>3</sup>, the court may direct that the interim order is to continue or, if it has ceased to have effect, is to be renewed, for such further period as the court may specify in the direction<sup>4</sup>. On the application of the nominee, the court may extend the period for which the interim order has effect so as to enable the nominee to have more time to prepare his report<sup>5</sup>.

If the court is satisfied, on receiving the nominee's report, that a meeting of the debtor's creditors should be summoned to consider the debtor's proposal, the court must direct that the period for which the interim order has effect is to be extended, for such further period as it may specify in the direction, for the purpose of enabling the debtor's proposal to be considered by his creditors<sup>6</sup>.

The court may discharge the interim order if it is satisfied, on the application of the nominee, that the debtor has failed to comply with his obligation<sup>7</sup> to submit to the nominee a proposal and statement of affairs or that for any other reason it would be inappropriate for a meeting of the debtor's creditors to be summoned to consider the debtor's proposal<sup>8</sup>.

1    Ie an order made on an application under the Insolvency Act 1986 s 253: see para 84 ante.

2    Ibid s 255(6). Section 255(6) is subject to ss 256-263 (see infra; and para 92 et seq post): s 255(6).

3    Ie as required by ibid s 256: see para 95 post.

4    Ibid s 256(3)(b). As to the exercise of the court's jurisdiction to extend the period for which an interim order has effect see *Re Cove (a debtor)* [1990] 1 All ER 949 at 957, sub nom *Re a Debtor (No 83 of 1988)* [1990] 1 WLR 708 at 718; and as to the prospective substitution of the Insolvency Act 1986 s 256(3)(b) see para 96 note 5 post.

5    Ibid s 256(4). As to the nominee's report see para 95 post.

6    Ibid s 256(5). For the prescribed form of order extending the effect of an interim order see the Insolvency Rules 1986, SI 1986/1925, r 12.7(1), (2), Sch 4, Form 5.3 (added by SI 1987/1919). In suitable cases the court may be prepared to make a 'concertina' order without the attendance of either party combining a 14-day interim order with a standard order on consideration of the nominee's report extending the interim order to a date seven weeks after the date of the proposed meeting, directing the meeting to be summoned and adjourning to a date about three weeks after the meeting: see *Practice Direction-Insolvency Proceedings* para 16.1(3). However, the court's role in considering the nominee's report is not merely to rubber stamp the

nominee's report recommending that a meeting of creditors be held. The court has to be satisfied that a meeting should be held: *Re a Debtor (No 140 IO of 1995)* [1996] 2 BCLC 429, sub nom *Re a Debtor (No 140 IO of 1995)*, *Greystoke v Hamilton-Smith* [1997] BPIR 24.

7 le under the Insolvency Act 1986 s 256(2): see para 93 post.

8 Ibid s 256(6). The court may refuse to continue the interim order if it is satisfied that the creditors' meeting will serve no useful purpose because there is a strong probability that the debtor will be unable to obtain a majority vote in favour of his proposals: *Re Cove (a debtor)* [1990] 1 All ER 949, sub nom *Re a Debtor (No 83 of 1988)* [1990] 1 WLR 708.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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### (iii) Procedure on the Proposal

#### 91. Preparation and contents of the proposal.

The debtor<sup>1</sup> must prepare for the intended nominee<sup>2</sup> a proposal on which, with or without amendments<sup>3</sup>, to make his report<sup>4</sup> to the court<sup>5</sup>.

The debtor's proposal must provide a short explanation why, in his opinion, a voluntary arrangement<sup>6</sup> is desirable, and give reasons why his creditors may be expected to concur with such an arrangement<sup>7</sup>.

The following matters must be stated, or otherwise dealt with in the proposal<sup>8</sup>:

- 150 (1) the following matters, so far as within the debtor's immediate knowledge:
  - 11 14. (a) his assets, with an estimate of their respective values;
  15. (b) the extent, if any, to which the assets are charged in favour of creditors;
  16. (c) the extent, if any, to which particular assets are to be excluded from the voluntary arrangement<sup>9</sup>;
- 12 151 (2) particulars of any property, other than assets of the debtor himself, which is proposed to be included in the arrangement, the source of such property and the terms on which it is to be made available for inclusion<sup>10</sup>;
- 152 (3) the nature and amount of the debtor's liabilities, so far as within his immediate knowledge, the manner in which they are proposed to be met, modified, postponed or otherwise dealt with by means of the arrangement and, in particular:
  - 13 17. (a) how it is proposed to deal with preferential creditors<sup>11</sup> and creditors who are, or claim to be, secured<sup>12</sup>;



18. (b) how associates<sup>13</sup> of the debtor, being creditors of his, are proposed to be treated under the arrangement; and
19. (c) where the debtor is an undischarged bankrupt<sup>14</sup>, whether, to the debtor's knowledge, claims have been made under the provisions dealing with transactions at an undervalue<sup>15</sup>, preferences<sup>16</sup> or extortionate credit transactions<sup>17</sup>, or there are circumstances giving rise to the possibility of such claims; and, in any other case, whether there are circumstances which would give rise to the possibility of such claims in the event that he should be adjudged bankrupt;
- 14
- 153 and, where any such circumstances are present, whether, and if so how, it is proposed under the voluntary arrangement to make provision for wholly or partly indemnifying the insolvent estate<sup>18</sup> in respect of such claims<sup>19</sup>;
- 154 (4) whether any, and, if so, what, guarantees have been given of the debtor's debts by other persons, specifying which, if any, of the guarantors are associates of his<sup>20</sup>;
- 155 (5) the proposed duration of the voluntary arrangement<sup>21</sup>;
- 156 (6) the proposed dates of distributions to creditors, with estimates of their amounts<sup>22</sup>;
- 157 (7) the amount proposed to be paid to the nominee as such by way of remuneration and expenses<sup>23</sup>;
- 158 (8) the manner in which it is proposed that the supervisor of the arrangement should be remunerated, and his expenses defrayed<sup>24</sup>;
- 159 (9) whether, for the purposes of the arrangement, any guarantees are to be offered by any persons other than the debtor, and whether, if so, any security is to be given or sought<sup>25</sup>;
- 160 (10) the manner in which funds held for the purposes of the arrangement are to be banked, invested or otherwise dealt with pending distribution to creditors<sup>26</sup>;
- 161 (11) the manner in which funds held for the purpose of payment to creditors, and not so paid on the termination of the arrangement, are to be dealt with<sup>27</sup>;
- 162 (12) if the debtor has any business, the manner in which it is proposed to be conducted during the course of the arrangement<sup>28</sup>;
- 163 (13) details of any further credit facilities which it is intended to arrange for the debtor, and how the debts so arising are to be paid<sup>29</sup>;
- 164 (14) the functions which are to be undertaken by the supervisor of the arrangement<sup>30</sup>;
- 165 (15) the name, address and qualification of the person proposed as supervisor of the voluntary arrangement, and confirmation that he is, so far as the debtor is aware, qualified to act as an insolvency practitioner in relation to him<sup>31</sup>.

With the agreement in writing of the nominee, the debtor's proposal may be amended at any time up to the delivery of the former's report to the court<sup>32</sup>.

1 For the meaning of 'the debtor' see para 82 note 2 ante.

2 For the meaning of 'the nominee' see para 81 ante.

3 Ie with or without amendments to be made under the Insolvency Rules 1986, SI 1986/1925, r 5.3(3): see *infra*.

4 Ie under the Insolvency Act 1986 s 256: see para 95 post.

5 *Ibid* s 256(2)(a); Insolvency Rules 1986, SI 1986/1925, r 5.2.

6 Ie under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 ante and para 92 et seq post.

7 Insolvency Rules 1986, SI 1986/1925, r 5.3(1).

8 It is important that the matters referred to in *ibid* r 5.3(2) (as amended) (see text heads (1)-(15) *infra*) are addressed comprehensively because the nominee must bring a critical eye to the debtor's statements of assets and liabilities and must assess whether the proposal contains the necessary matters which must be contained in the proposal according to the Insolvency Rules 1986, SI 1986/1925 (as amended): see *Re a Debtor (No 222 of 1990)*, *ex p Bank of Ireland* [1992] BCLC 137.

9 Insolvency Rules 1986, SI 1986/1925, r 5.3(2)(a).

10 *Ibid* r 5.3(2)(b).

11 For the meaning of 'preferential creditor' see para 100 note 11 *post*.

12 For the meaning of 'secured creditor' see para 560 *post*.

13 For the meaning of 'associate' see para 5 *ante*.

14 For the meaning of 'bankrupt' see para 84 note 4 *ante*. As to discharge from bankruptcy see para 629 *et seq post*.

15 *Ie* under the Insolvency Act 1986 s 339: see para 653 *et seq post*.

16 *Ie* under *ibid* s 340: see para 653 *et seq post*.

17 *Ie* under *ibid* s 343: see para 672 *et seq post*.

18 For these purposes, references to 'the insolvent estate' are, in relation to an individual insolvent, the bankrupt's estate or, as the case may be, the debtor's property: Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.8(b).

19 *Ibid* rr 5.1(2), 5.3(2)(c) (amended by SI 1987/1919).

20 Insolvency Rules 1986, SI 1986/1925, r 5.3(2)(d).

21 *Ibid* r 5.3(2)(e).

22 *Ibid* r 5.3(2)(f).

23 *Ibid* r 5.3(2)(g).

24 *Ibid* r 5.3(2)(h). As to the supervisor see para 108 *et seq post*; and as to his fees, costs, charges and expenses see para 116 *post*.

25 *Ibid* r 5.3(2)(j).

26 *Ibid* r 5.3(2)(k).

27 *Ibid* r 5.3(2)(l).

28 *Ibid* r 5.3(2)(m).

29 *Ibid* r 5.3(2)(n).

30 *Ibid* r 5.3(2)(o).

31 *Ibid* r 5.3(2)(p). As to insolvency practitioners and their qualification see para 42 *et seq ante*; but see also para 81 note 6 head (2) *ante*.

32 *Ibid* r 5.3(3).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

## **91 Preparation and contents of the proposal**

TEXT AND NOTE 19--SI 1986/1925 r 5(2) substituted, r 5(3), (4) added: SI 2003/1730.

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## **92. Notice to intended nominee, official receiver and trustee.**

The debtor<sup>1</sup> must give to the intended nominee written notice of his proposal<sup>2</sup>; and the notice, accompanied by a copy of the proposal, must be delivered either to the nominee himself, or to a person authorised to take delivery of documents on his behalf<sup>3</sup>. If the intended nominee agrees to act, he must cause a copy of the notice to be indorsed to the effect that it has been received by him on a specified date<sup>4</sup>. The copy of the notice so indorsed must be returned by the nominee forthwith to the debtor at an address specified by him in the notice for that purpose<sup>5</sup>. Where the debtor is an undischarged bankrupt<sup>6</sup> and he gives notice of his proposal to the official receiver<sup>7</sup> and, if any, the trustee<sup>8</sup>, the notice must contain the name and address of the insolvency practitioner<sup>9</sup> who has agreed to act as nominee<sup>10</sup>.

1 For the meaning of 'the debtor' see para 82 note 2 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 5.4(1). As to the mode of giving notices see para 797 post.

3 Ibid r 5.4(2).

4 Ibid r 5.4(3).

5 Ibid r 5.4(4).

6 For the meaning of 'bankrupt' see para 84 note 4 ante. As to discharge from bankruptcy see para 629 et seq post.

7 As to the official receiver see para 31 et seq ante.

8 As to the trustee see para 316 et seq post.

9 As to insolvency practitioners and their qualification see para 42 et seq ante; but see also para 81 note 6 head (2) ante.

10 Insolvency Rules 1986, SI 1986/1925, r 5.4(5).

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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### 93. Statement of affairs.

For the purpose of enabling the nominee to prepare his report<sup>1</sup>, the debtor<sup>2</sup> must submit to the nominee a statement of affairs containing such particulars of his creditors and of his debts and other liabilities and of his assets as may be prescribed, and such other information as may be prescribed<sup>3</sup>.

Where the debtor is an undischarged bankrupt<sup>4</sup>, then, if he has already delivered a statement of affairs<sup>5</sup>, he need not deliver a further statement unless so required by the nominee, with a view to supplementing or amplifying the former one<sup>6</sup>. In any other case, the debtor must, within seven days after his proposal is delivered to the nominee, or within such longer time as the latter may allow, deliver to the nominee a statement of his, the debtor's, affairs<sup>7</sup>.

The statement must comprise the following particulars, supplementing or amplifying, so far as is necessary for clarifying the state of the debtor's affairs, those already given in his proposal:

- 166 (1) a list of his assets, divided into such categories as are appropriate for easy identification, with estimated values assigned to each category<sup>8</sup>;
- 167 (2) in the case of any property on which a claim against the debtor is wholly or partly secured, particulars of the claim and its amount, and of how and when the security was created<sup>9</sup>;
- 168 (3) the names and addresses of the debtor's preferential creditors<sup>10</sup>, with the amounts of their respective claims<sup>11</sup>;
- 169 (4) the names and addresses of the debtor's unsecured creditors<sup>12</sup>, with the amounts of their respective claims<sup>13</sup>;
- 170 (5) particulars of any debts owed by or to the debtor to or by persons who are associates<sup>14</sup> of his<sup>15</sup>;
- 171 (6) such other particulars, if any, as the nominee may in writing require to be furnished for the purposes of making his report to the court on the debtor's proposal<sup>16</sup>.

The statement of affairs must be made up to a date not earlier than two weeks before the date of the notice<sup>17</sup> to the nominee<sup>18</sup>. The nominee may, however, allow an extension of that period to the nearest practicable date, not earlier than two months before the date of the notice to the nominee; and, if he does so, he must give his reasons in his report to the court on the debtor's proposal<sup>18</sup>. The statement must be certified by the debtor as correct to the best of his knowledge and belief<sup>19</sup>.

1 le pursuant to the Insolvency Act 1986 s 256(1): see para 95 post.

2 For the meaning of 'the debtor' see para 82 note 2 ante.

3 Insolvency Act 1986 s 256(2)(b). As to the prescribed particulars see infra; and as to the disclosure of additional information for the assistance of the nominee see para 94 post. See also the Insolvency Act 1986 s 256A(2) (prospectively added by the Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 para 7); and para 89 ante.

Where the court has made an interim order under the Insolvency Act 1986 s 252 (see para 83 ante) in respect of an individual who subsequently dies, s 256 applies with the modification that, where the individual dies before he has submitted the document and statement referred to in s 256(2), the nominee must, after the death of the individual comes to his knowledge, give notice to the court that the individual has died, and, after receiving such notice, the court must discharge the order mentioned in s 256(1) (see para 95 post): s 256(1A),

(1B) (added by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt III para 1). As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 For the meaning of 'bankrupt' see para 84 note 4 ante. As to discharge from bankruptcy see para 629 et seq post.

5 le under the Insolvency Act 1986 s 272 (debtor's petition: see para 159 post) or s 288 (creditor's petition: see para 244 post).

6 Insolvency Rules 1986, SI 1986/1925, rr 5.1(2), 5.8(1).

7 Ibid rr 5.1(2), 5.8(2).

8 Ibid r 5.8(3)(a).

9 Ibid r 5.8(3)(b).

10 For the meaning of 'preferential creditor' see para 100 note 11 post.

11 Insolvency Rules 1986, SI 1986/1925, r 5.8(3)(c).

12 For the meaning of 'secured creditor' see para 560 post.

13 Insolvency Rules 1986, SI 1986/1925, r 5.8(3)(d).

14 For the meaning of 'associate' see para 5 ante.

15 Insolvency Rules 1986, SI 1986/1925, r 5.8(3)(e).

16 Ibid r 5.8(3)(f). As to the nominee's report to the court see para 95 post.

17 le under ibid r 5.4: see para 92 ante.

18 Ibid r 5.8(4).

19 Ibid r 5.8(5).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 93 Statement of affairs

TEXT AND NOTE 6--SI 1986/1925 r 5(2) substituted, r 5(3), (4) added: SI 2003/1730.

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### 94. Additional disclosure for assistance of nominee.

If it appears to the nominee that he cannot properly prepare his own report<sup>1</sup> on the basis of information in the debtor's proposal and statement of affairs, he may call on the debtor<sup>2</sup> to provide him with:

- 172 (1) further and better particulars as to the circumstances in which, and the reasons why, he is insolvent or, as the case may be, threatened with insolvency;
- 173 (2) particulars of any previous proposals which have been made by him<sup>3</sup>;
- 174 (3) any further information with respect to his affairs which the nominee thinks necessary for the purposes of his report<sup>4</sup>.

The nominee may call on the debtor to inform him whether and in what circumstances he has at any time been concerned in the affairs of any company, whether or not incorporated in England and Wales, which has become insolvent, or been adjudged bankrupt<sup>5</sup>, or entered into an arrangement with his creditors<sup>6</sup>.

For the purpose of enabling the nominee to consider the debtor's proposal and prepare his report on it, the latter must give him access to his accounts and records<sup>7</sup>.

- 1 As to the nominee's duty to report to the court see para 95 post.
- 2 For the meaning of 'the debtor' see para 82 note 2 ante.
- 3 I.e. under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 ante and para 95 et seq post.
- 4 Insolvency Rules 1986, SI 1986/1925, r 5.9(1).
- 5 For the meaning of 'bankrupt' see para 84 note 4 ante.
- 6 Insolvency Rules 1986, SI 1986/1925, r 5.9(2). As to arrangements with creditors see para 859 et seq post.
- 7 Ibid r 5.9(3).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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### 95. Nominee's report on debtor's proposal.

Where an interim order has been made on an application under the statutory provisions<sup>1</sup>, the nominee must, before the order ceases to have effect<sup>2</sup>, submit a report to the court stating:

- 175 (1) whether, in his opinion, a meeting of the debtor's creditors should be summoned to consider the debtor's proposal<sup>3</sup>; and

176 (2) if, in his opinion, such a meeting should be summoned, the date on which, and time and place at which, he proposes the meeting should be held<sup>4</sup>.

The nominee's report must be delivered by him to the court not less than two days before the interim order ceases to have effect<sup>5</sup>; and with his report the nominee must deliver a copy of the debtor's proposal, with amendments, if any, authorised under the statutory provisions<sup>6</sup>, and a copy or summary of any statement of affairs provided by the debtor<sup>7</sup>.

If the nominee makes known his opinion that a meeting of the debtor's creditors should be summoned<sup>8</sup>, his report must have annexed to it his comments on the debtor's proposal; and, if his opinion is otherwise, he must give his reasons for that opinion<sup>9</sup>. The court must cause the nominee's report to be indorsed with the date on which it is filed in court<sup>10</sup>; and any creditor of the debtor is entitled, at all reasonable times on any business day<sup>11</sup>, to inspect the file<sup>12</sup>.

Where the debtor is an undischarged bankrupt<sup>13</sup>, the nominee must send to the official receiver<sup>14</sup> and, if any, the trustee<sup>15</sup>, a copy of the debtor's proposal, a copy of his, the nominee's, report and his comments accompanying it, if any, and a copy of the debtor's statement of affairs; and, in any other case, the nominee must send a copy of each of those documents to any person who has presented a bankruptcy petition<sup>16</sup> against the debtor<sup>17</sup>. At the hearing by the court to consider the nominee's report<sup>18</sup> any of the persons given notice<sup>19</sup> of the application for an interim order may appear or be represented<sup>20</sup>.

1 le under the Insolvency Act 1986 s 253: see para 84 ante.

2 See para 90 ante.

3 Insolvency Act 1986 s 256(1)(a). For the meaning of 'the debtor' see para 82 note 2 ante. For the purpose of enabling the nominee to prepare his report, the debtor must submit to the nominee: (1) a document setting out the terms of the voluntary arrangement which the debtor is proposing; and (2) a statement of his affairs containing such particulars of his creditors and of his debts and other liabilities and of his assets as may be prescribed, and such other information as may be prescribed: s 256(2). As to the statement of affairs see para 93 ante.

As from such day as the Secretary of State may by order made by statutory instrument appoint there is to be inserted in s 256(1)(a) at the beginning the words:

24 'whether, in his opinion, the voluntary arrangement which the debtor is proposing has a reasonable prospect of being approved and implemented,

25 (aa)':

Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 6(a). At the date at which this volume states the law no such day had been appointed.

4 Insolvency Act 1986 s 256(1)(b).

5 le under the Insolvency Rules 1986, SI 1986/1925, r 5.3(3): see para 91 ante.

6 Ibid r 5.10(1).

7 Ibid r 5.10(2).

8 le under the Insolvency Act 1986 s 257: see para 97 post. In forming his opinion, the nominee must satisfy himself that the debtor's position has not been misrepresented, that the proposal has real chances of implementation and that the proposal contains no manifest unfairness: see *Re a Debtor (No 140 IO of 1995)* [1996] 2 BCLC 429, sub nom *Re a Debtor (No 140 IO of 1995)*, *Greystoke v Hamilton-Smith* [1997] BPIR 24. Where a nominee falls below the required professional standard in making his report, he may be liable for the costs of proceedings arising from his conduct: *Re a Debtor (No 222 of 1990)*, *ex p Bank of Ireland (No 2)* [1993] BCLC 233.

9 Insolvency Rules 1986, SI 1986/1925, r 5.10(3).

10 For these purposes, 'file in court' means deliver to the court for filing: *ibid* rr 13.1, 13.3(3).

11 'Business day' means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday in England and Wales under or by virtue of the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321), except in the Insolvency Rules 1986, SI 1986/1925, r 5.10 (see supra) and r 6.23 (see para 177 post) where 'business day' includes any day which is a bank holiday in Scotland but not in England and Wales: Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.13(1) (substituted by SI 1999/1222).

12 Insolvency Rules 1986, SI 1986/1925, r 5.10(4).

13 For the meaning of 'bankrupt' see para 84 note 4 ante. As to discharge from bankruptcy see para 629 et seq post.

14 As to the official receiver see para 31 et seq ante.

15 As to the trustee see para 316 et seq post.

16 As to bankruptcy petitions see para 124 et seq post.

17 Insolvency Rules 1986, SI 1986/1925, rr 5.1(2), 5.10(5) (amended by SI 1987/1919).

18 Ie pursuant to the Insolvency Act 1986 s 256(5): see para 90 ante.

19 Ie under the Insolvency Rules 1986, SI 1986/1925, r 5.5(4): see para 84 ante.

20 Ibid r 5.12(1). Rule 5.7 (see para 88 ante) applies to any order made by the court at the hearing: r 5.12(2).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 95 Nominee's report on debtor's proposal

NOTE 3--Day now appointed: SI 2002/2711.

NOTE 10--SI 1986/1925 r 13.13(3) amended: SI 2003/1730.

TEXT AND NOTE 17--SI 1986/1925 r 5(2) substituted, r 5(3), (4) added: SI 2003/1730.

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### 96. Failure to submit report; replacement of nominee.

On the application of the nominee, the court may extend the period for which the interim order has effect so as to enable the nominee to have more time to prepare his report<sup>1</sup>.

On an application made by the debtor<sup>2</sup> in a case where the nominee has failed to submit a report<sup>3</sup>, the court may do one or both of the following namely:

- 177 (1) direct that the nominee is to be replaced as such by another person qualified to act as an insolvency practitioner in relation to the debtor<sup>4</sup>;



178 (2) direct that the interim order is to continue, or, if it has ceased to have effect, is to be renewed, for such further period as the court may specify in the direction<sup>5</sup>.

Where the debtor intends so to apply to the court for the nominee to be replaced, he must give to the nominee at least seven days' notice of his application<sup>6</sup>.

1 See the Insolvency Act 1986 s 256(4); and para 90 ante.

2 For the meaning of 'the debtor' see para 82 note 2 ante.

3 le as required by the Insolvency Act 1986 s 256: see para 95 ante.

4 As to insolvency practitioners and their qualification see para 42 et seq ante; but see also para 81 note 6 head (2) ante.

5 Insolvency Act 1986 s 256(3). As from such day as the Secretary of State may by order made by statutory instrument appoint for s 256(3) there is to be substituted:

26 '(3) The court may:

11. (a) on an application made by the debtor in a case where the nominee has failed to submit the report required by this section or has died; or  
11

12. (b) on an application made by the debtor or the nominee in a case where it is impracticable or inappropriate for the nominee to continue to act as such,  
12

27 direct that the nominee shall be replaced as such by another person qualified to act as an insolvency practitioner or authorised to act as nominee in relation to the voluntary arrangement;

28 (3A) The court may on an application made by the debtor in a case where the nominee has failed to submit the report required by this section direct that the interim order shall continue or (if it has ceased to have effect) be renewed, for such further period as the court may specify in the direction':

Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 6(b). At the date at which this volume states the law no such day had been appointed.

6 Insolvency Rules 1986, SI 1986/1925, r 5.11.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 96 Failure to submit report; replacement of nominee

NOTE 5--Day now appointed: SI 2002/2711.

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### 97. Summoning of meetings.

If the court is satisfied, on receiving the nominee's report<sup>1</sup>, that a meeting of the debtor's creditors should be summoned to consider the debtor's proposal, the court must direct that the period for which the interim order has effect<sup>2</sup> is to be extended, for such further period as it may specify in the direction<sup>3</sup>, for the purpose of enabling the debtor's proposal to be considered by his creditors in accordance with the statutory provisions<sup>4</sup>. The court may, however, discharge the interim order if it is satisfied, on the application of the nominee, that the debtor has failed to comply with his obligation to submit to the nominee a proposal and statement of affairs<sup>5</sup> or that for any other reason it would be inappropriate for a meeting of the debtor's creditors to be summoned to consider the debtor's proposal<sup>6</sup>.

Where it has been reported to the court<sup>7</sup> that a meeting of the debtor's creditors should be summoned, the nominee or his replacement<sup>8</sup> must, unless the court otherwise directs, summon that meeting for the time, date and place proposed in the report<sup>9</sup>. The persons summoned to the meeting are every creditor of the debtor of whose claim and address the person summoning the meeting is aware<sup>10</sup>.

If in his report the nominee states that in his opinion a meeting of creditors should be summoned to consider the debtor's proposal, the date on which the meeting is to be held must be not less than 14 days from that on which the nominee's report is filed in court<sup>11</sup> nor more than 28 days from that on which the report is considered<sup>12</sup> by the court<sup>13</sup>.

Notices calling the meeting must be sent by the nominee at least 14 days before the day fixed for it to be held, to all the creditors specified in the debtor's statement of affairs, and any other creditors of whom the nominee is otherwise aware<sup>14</sup>. Each such notice must specify the court to which the nominee's report on the debtor's proposal has been delivered and must state the effect of the provisions dealing with requisite majorities of creditors at the meeting<sup>15</sup>; and with it there must be sent:

- 179 (1) a copy of the proposal<sup>16</sup>;
- 180 (2) a copy of the statement of affairs<sup>17</sup> or, if the nominee thinks fit, a summary of it, the summary to include a list of the creditors and the amounts of their debts; and
- 181 (3) the nominee's comments on the proposal<sup>18</sup>.

1 As to the nominee's report see para 95 ante.

2 As to the duration of interim orders see para 90 ante.

3 As to the court's jurisdiction to extend the period for which an interim order has effect see *Re Cove (a debtor)* [1990] 1 All ER 949 at 957, sub nom *Re a Debtor (No 83 of 1988)* [1990] 1 WLR 708 at 718.

4 Insolvency Act 1986 s 256(5). The statutory provisions referred to are ss 257-263 (see infra; and para 98 et seq post): s 256(5). See further para 105 note 11 post.

5 I.e the obligation under *ibid* s 256(2): see para 93 ante.

6 *Ibid* s 256(6).

7 I.e under *ibid* s 256: see supra; and para 95 ante.

8 I.e under *ibid* s 256(3)(a): see para 96 head (2) ante.

9 *Ibid* s 257(1). As from such day as the Secretary of State may by order made by statutory instrument appoint in s 257(1) after the word '256' there are to be inserted the words 'or 256A' and for the word '256(3)(a)' there are to be substituted the words '256(3) or 256A(4)': Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 8(a), (b). At the date at which this volume states the law no such day had been appointed.

Where the court has made an interim order under the Insolvency Act 1986 s 252 (see para 83 ante) in respect of an individual who subsequently dies, s 257 applies with the modification that, where the individual dies

before a creditors' meeting has been held, then no such meeting may be held and, if the individual was at the date of his death an undischarged bankrupt, the personal representative must give notice of the death to the trustee of his estate and the official receiver: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt III para 2. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

10 Insolvency Act 1986 s 257(2). For these purposes, the creditors of the debtor who is an undischarged bankrupt include: (1) every person who is a creditor of the bankrupt in respect of a bankruptcy debt; and (2) every person who would be such a creditor if the bankruptcy had commenced on the day on which notice of the meeting was given: s 257(3).

11 Ie under the Insolvency Rules 1986, SI 1986/1925, r 5.10 (as amended): see para 95 ante. For the meaning of 'file in court' see para 95 note 10 ante.

12 Ie under ibid r 5.12: see para 95 ante.

13 Ibid r 5.13(1) (amended by SI 1987/1919).

14 Insolvency Rules 1986, SI 1986/1925, r 5.13(2). For the creditor to be bound, it is not sufficient that the notice is sent; the notice must also have been properly delivered: see *Re a Debtor (No 64 of 1992)* [1994] 2 All ER 177, [1994] 1 WLR 264. See also *Skipton Building Society v Collins* [1998] BPIR 267 (14 days' clear notice is required); *Mytre Investments Ltd v Reynolds (No 2)* [1996] BPIR 464; cf *Beverley Group plc v McClue* [1995] 2 BCLC 407, [1995] BCC 751. For the provisions dealing with the giving of notice see the Insolvency Rules 1986, SI 1986/1925, r 12.4 (cited in para 798 post); and for the provisions relating to non-receipt of the notice of the meeting see r 12.16 (cited in para 802 post).

15 Ie the effect of ibid r 5.18(1), (3), (4): see para 102 post.

16 As to the proposal see para 91 et seq ante.

17 As to the statement of affairs see para 93 ante.

18 Insolvency Rules 1986, SI 1986/1925, r 5.13(3).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 97 Summoning of meetings

NOTE 9--Day now appointed: SI 2002/2711.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(iv) Consideration of the Proposal/A. MEETING OF CREDITORS/98. Summoning of meeting; proxies.

## (iv) Consideration of the Proposal

### A. MEETING OF CREDITORS

#### 98. Summoning of meeting; proxies.

In fixing the venue<sup>1</sup> for the creditors' meeting, the nominee must have regard to the convenience of creditors<sup>2</sup>. The meeting must be summoned for commencement between 10.00 and 16.00 hours on a business day<sup>3</sup>; and with every notice summoning the meeting there must be sent out forms of proxy<sup>4</sup>.

1 For the meaning of 'venue' see para 84 note 21 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 5.14(1).

3 Ibid r 5.14(2). For the meaning of 'business day' see para 95 note 11 ante.

4 Ibid r 5.14(3). Proxies sent by facsimile are acceptable: see *Re a Debtor (No 2021 of 1995), ex p IRC v Debtor*, *Re a Debtor (No 2022 of 1995), ex p IRC v Debtor* [1996] 2 All ER 345, [1996] 1 BCLC 538. A creditor is entitled to amend a proxy between meetings if there is an adjournment: see *Re Cardona, IRC v Cardona* [1997] BCC 697, [1997] BPIR 604. For the prescribed form of proxy see the Insolvency Rules 1986, SI 1986/1925, rr 5.14(3), 12.7(1), (2), Sch 4, Form 8.1. The provisions relating to proxies are the same as those which apply to meetings in a bankruptcy: see para 278 et seq post; but see also para 99 post.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 98 Summoning of meeting; proxies

TEXT AND NOTES--SI 1986/1925 r 5.14 substituted by r 5.14A (nominee's report), r 5.14B (applications to the court): SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(iv) Consideration of the Proposal/A. MEETING OF CREDITORS/99. Chairman of the meeting.

### 99. Chairman of the meeting.

The nominee must be the chairman of the creditors' meeting<sup>1</sup>. If, however, for any reason the nominee is unable to attend, he may nominate another person to act as chairman in his place; but a person so nominated must be either a person qualified to act as an insolvency practitioner in relation to the debtor<sup>2</sup> or an employee of the nominee or his firm who is experienced in insolvency matters<sup>3</sup>.

The chairman may not, by virtue of any proxy held by him, vote to increase or reduce the amount of the remuneration or expenses of the nominee or the supervisor<sup>4</sup> of the proposed arrangement, unless the proxy specifically directs him to vote in that way<sup>5</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 5.15(1).

2 As to insolvency practitioners and their qualification see para 42 et seq ante; but see also para 81 note 6 head (2) ante. For the meaning of 'the debtor' see para 82 note 2 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 5.15(2).

4 As to the supervisor see para 108 et seq post.

5 Insolvency Rules 1986, SI 1986/1925, r 5.16. As to the position where the chairman uses a proxy contrary to this provision see para 102 text and notes 16, 17 post.

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### **99 Chairman of the meeting**

TEXT AND NOTES--SI 1986/1925 rr 5.15, 5.16 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(iv) Consideration of the Proposal/B. DECISIONS OF MEETINGS; VOTING RIGHTS AND MAJORITIES/100. Decisions of creditors' meetings.

## ***B. DECISIONS OF MEETINGS; VOTING RIGHTS AND MAJORITIES***

### **100. Decisions of creditors' meetings.**

A creditors' meeting summoned<sup>1</sup> to consider the proposal must decide whether to approve the proposed voluntary arrangement<sup>2</sup>; and the meeting may approve the proposed voluntary arrangement with modifications<sup>3</sup>, but may not do so unless the debtor<sup>4</sup> consents to each modification<sup>5</sup>. The modifications subject to which the proposed voluntary arrangement may be approved may include one conferring the functions proposed to be conferred on the nominee on another person qualified to act as an insolvency practitioner in relation to the debtor<sup>6</sup>; but they must not include any modification by which the proposal ceases to be a proposal<sup>7</sup> for a voluntary arrangement<sup>8</sup>.

A meeting so summoned may not approve any proposal or modification which affects the right of a secured creditor<sup>9</sup> of the debtor to enforce his security, except with the concurrence of the creditor concerned<sup>10</sup>. Nor may the meeting approve any proposal or modification under which:

182 (1) any preferential debt<sup>11</sup> of the debtor is to be paid otherwise than in priority to such of his debts as are not preferential debts; or

183 (2) a preferential creditor<sup>11</sup> of the debtor is to be paid an amount that bears to the debt a smaller proportion than is borne to another preferential debt by the amount that is to be paid in respect of that other debt;

but the meeting may approve such a proposal or modification with the concurrence of the preferential creditor concerned<sup>12</sup>.

Subject to the above provisions, the meeting must be conducted in accordance with<sup>13</sup> the Insolvency Rules 1986<sup>14</sup>; but an approval given at a meeting is not invalidated by any irregularity at or in relation to the meeting<sup>15</sup>.

1 le the meeting summoned under the Insolvency Act 1986 s 257: see para 97 ante.

2 Ibid s 258(1). Where the court has made an interim order under s 252 (see para 83 ante) in respect of an individual who subsequently dies, s 258 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt III para 3. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

3 For these purposes, except in so far as the context otherwise requires, 'modifications' includes additions, alterations and omissions; and cognate expressions are to be construed accordingly: Insolvency Act 1986 s 436. As to the application of s 436 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 21 note 11 ante. If a proposal is rejected at the meeting, it cannot be approved at a subsequent meeting: *Re Symes (a debtor), Kent Carpets Ltd v Symes* [1995] 2 BCLC 651, [1996] BCC 137. A voluntary arrangement cannot be modified after approval, unless all creditors consent or there is a provision for modification in the original proposal: *Raja v Rubin* [2000] Ch 274, [1999] 3 All ER 73, CA; and see *Re Broome (a debtor), Thompson v Broome* [1999] 1 BCLC 356, sub nom *Horrocks v Broome* [1999] BPIR 66; *Re Alpa Lighting Ltd* [1997] BPIR 341.

4 For the meaning of 'the debtor' see para 82 note 2 ante.

5 Insolvency Act 1986 s 258(2).

6 Ibid s 258(3). As to insolvency practitioners and their qualification see para 42 et seq ante; but see also para 81 note 6 head (2) ante. As from such day as the Secretary of State may by order made by statutory instrument appoint in s 258(3) for the words 'in relation to the debtor' there are to be substituted the words 'or authorised to act as nominee, in relation to the voluntary arrangement' and for the words 'such as is mentioned in section 253' there are to be substituted the words 'under this Part': Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 9. At the date at which this volume states the law no such day had been appointed.

7 le a proposal such as is mentioned in the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 ante and para 101 et seq post.

8 Ibid s 258(3).

9 For the meaning of 'secured creditor' see para 560 post.

10 Insolvency Act 1986 s 258(4).

11 For these purposes, 'preferential debt' has the meaning given by ibid s 386 (as amended) (see para 577 post); and 'preferential creditor' is to be construed accordingly: s 258(7).

12 Ibid s 258(5). Goods seized under a writ of fieri facias constitute security: see *Peck v Craighead* [1995] 1 BCLC 337, sub nom *Re a Debtor (No 10 of 1992)*, *Peck v Craighead* [1995] BCC 525; cf the Insolvency Act 1986 s 346(5), (6) (cited in paras 678, 679 post). A right of re-entry is not security: *Razzaq v Pala* [1997] 1 WLR 1336, [1997] BPIR 726; and see *Christopher Moran Holdings Ltd v Bairstow* [2000] 2 AC 172, sub nom *Re Park Air Services plc, Christopher Moran Holdings Ltd v Bairstow* [1999] 1 All ER 673, HL.

13 le in accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended): see para 98 et seq ante and para 101 et seq post.

14 Insolvency Act 1986 s 258(6).

15 Ibid s 262(8). Section 262(8) is subject to the right to challenge decisions under s 262 (see paras 118-120 post); s 262(8). Where the court has made an interim order under s 252 (see para 83 ante) in respect of an individual who subsequently dies, s 262 applies with the modification that it ceases to apply on or after the death of the individual: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt III para 4.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

## 100 Decisions of creditors' meetings

NOTE 6--Day now appointed: SI 2002/2711.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(iv) Consideration of the Proposal/B. DECISIONS OF MEETINGS; VOTING RIGHTS AND MAJORITIES/101. Voting rights.

### 101. Voting rights.

Subject to the following provisions, every creditor who was given notice of the creditors' meeting<sup>1</sup> is entitled to vote at the meeting or any adjournment of it<sup>2</sup>. Where the debtor<sup>3</sup> is an undischarged bankrupt<sup>4</sup>, votes are calculated according to the amount of the creditor's debt as at the date of the bankruptcy order, and, in any other case, according to the amount of the debt as at the date of the meeting<sup>5</sup>. A creditor may not, however, vote in respect of a debt for an unliquidated amount, or any debt whose value is not ascertained, except where the chairman agrees to put on the debt an estimated minimum value for the purpose of entitlement to vote<sup>6</sup>.

The chairman has power to admit or reject a creditor's claim for the purpose of his entitlement to vote, and the power is exercisable with respect to the whole or any part of the claim<sup>7</sup>. The chairman's decision on entitlement to vote is, however, subject to appeal to the court by any creditor, or by the debtor<sup>8</sup>. If the chairman is in doubt whether a claim should be admitted or rejected, he must mark it as objected to and allow the creditor to vote, subject to his vote being subsequently declared invalid if the objection to the claim is sustained<sup>9</sup>. If on an appeal the chairman's decision is reversed or varied, or a creditor's vote is declared invalid, the court may order another meeting to be summoned, or make such other order as it thinks just; but the court's power to make such an order is exercisable only if it considers that the matter is such as to give rise to unfair prejudice or a material irregularity<sup>10</sup>.

An application to the court by way of appeal against the chairman's decision may not be made after the end of the period of 28 days beginning with the day on which the chairman's report to the court<sup>11</sup> is made<sup>12</sup>. The chairman is not, however, personally liable for any costs incurred by any person in respect of an appeal to the court under the above provisions<sup>13</sup>.

1 As to the creditors to be given notice of the meeting see para 97 ante. A creditor who has deliberately not been given notice of the meeting but obtains actual notice and attends is entitled to vote: *Re a Debtor (No 400-IO-1996)*, *Re a Debtor (No 401-IO-1996)* [1997] 1 WLR 1319.

2 Insolvency Rules 1986, SI 1986/1925, r 5.17(1). A creditor with a future or contingent debt who receives notice of the meeting is entitled to vote and will be bound if the proposal is approved: *Re Cancol Ltd* [1996] 1 All ER 37, [1996] 1 BCLC 100.

3 For the meaning of 'the debtor' see para 82 note 2 ante.

4 For the meaning of 'bankrupt' see para 84 note 4 ante. As to discharge from bankruptcy see para 629 et seq post.

5 Insolvency Rules 1986, SI 1986/1925, rr 5.1(2), 5.17(2). A creditor who votes must vote for all his debts not just for those included in the debtor's proposal: *Re Hoare* [1997] BPIR 683.

6 Insolvency Rules 1986, SI 1986/1925, r 5.17(3). 'Agrees' does not require bilateral concurrence between the chairman of the creditors' meeting and the creditor, merely that the chairman should be willing to place a

value on the unliquidated or unascertained claim of the creditor: *Doorbar v Alltime Securities Ltd* [1996] 2 All ER 948, [1996] 1 WLR 456, CA. As to secured creditors and preferential creditors see para 100 ante; and as to debts secured by bills of exchange see para 102 post.

7 Insolvency Rules 1986, SI 1986/1925, r 5.17(4). There is no right to vote in respect of an unassessed bill of costs: *Re Wisepark Ltd* [1994] BCC 221.

8 Insolvency Rules 1986, SI 1986/1925, r 5.17(5). As to the mode of appeal and the procedure see *infra*; and para 739 et seq post.

9 *Ibid* r 5.17(6).

10 *Ibid* r 5.17(7). The court hearing an appeal against the chairman's decision may consider further evidence which was not before the chairman: *Re a Debtor (No 574 of 1995)* [1998] 2 BCLC 124 at 128, sub nom *National Westminster Bank plc v Scher* [1998] BPIR 224 at 227.

11 *Ie* under the Insolvency Act 1986 s 259: see para 105 post.

12 Insolvency Rules 1986, SI 1986/1925, r 5.17(8).

13 *Ibid* r 5.17(9); cf *Re a Debtor (No 222 of 1990)*, *ex p Bank of Ireland* [1992] BCLC 137; *Re a Debtor (No 222 of 1990)*, *ex p Bank of Ireland (No 2)* [1993] BCLC 233.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and *PARA*

### 101 Voting rights

TEXT AND NOTE 5--SI 1986/1925 r 5(2) substituted, r 5(3), (4) added: SI 2003/1730.

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### 102. Requisite majorities.

Subject to the following provisions, at the creditors' meeting for any resolution to pass approving any proposal or modification<sup>1</sup> there must be a majority in excess of three-quarters in value of the creditors present in person or by proxy<sup>2</sup> and voting on the resolution<sup>3</sup>. The same applies in respect of any other resolution proposed at the meeting, but substituting one-half for three-quarters<sup>4</sup>.

In the following cases there is to be left out of account a creditor's vote in respect of any claim or part of a claim:

184 (1) where written notice of the claim was not given, either at the meeting or before it, to the chairman or the nominee;

185 (2) where the claim or part is secured<sup>5</sup>;

186 (3) where the claim is in respect of a debt wholly or partly on, or secured by, a current bill of exchange or promissory note, unless the creditor is willing:



15

20. (a) to treat the liability to him on the bill or note of every person who is liable on it antecedently to the debtor<sup>6</sup>, and against whom a bankruptcy order<sup>7</sup> has not been made, or in the case of a company, which has not gone into liquidation<sup>8</sup>, as a security in his hands; and

21. (b) to estimate the value of the security and, for the purpose of entitlement to vote, but not for any distribution under the arrangement, to deduct it from his claim<sup>9</sup>.

16

Any resolution is invalid if those voting against it include more than half in value of the creditors, counting in these latter only those:

187 (i) to whom notice of the meeting was sent;

188 (ii) whose votes are not to be left out of account under the above provisions; and

189 (iii) who are not, to the best of the chairman's belief, associates<sup>10</sup> of the debtor<sup>11</sup>.

It is for the chairman of the meeting to decide whether a vote is to be left out of account<sup>12</sup> or a person is an associate of the debtor<sup>13</sup> and, in relation to the second of these two cases, the chairman is entitled to rely on the information provided by the debtor's statement of affairs<sup>14</sup> or otherwise in accordance with the rules relating to voluntary arrangements<sup>15</sup>.

If the chairman uses a proxy to vote for an increase or reduction in the amount of the remuneration or expenses of the nominee or supervisor where the proxy does not specifically direct him so to vote<sup>16</sup>, his vote with that proxy does not count towards any majority under the above provisions<sup>17</sup>.

An appeal against the decision of the chairman under the above provisions lies to the court<sup>18</sup>.

1 As to the modifications which are permissible see para 100 ante.

2 As to the applicable provisions relating to proxies see para 98 note 4 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 5.18(1).

4 Ibid r 5.18(2).

5 For the meaning of 'secured creditor' see para 560 post. Where a debt is partly secured, the creditor is entitled to vote for that part of the debt which is not secured: *Re a Debtor (Nos 31/32/33 of 1993)*, *Calor Gas Ltd v Piercy* [1994] 2 BCLC 321.

6 For the meaning of 'the debtor' see para 82 note 2 ante.

7 As to bankruptcy orders see para 195 et seq post.

8 For the meaning of 'go into liquidation' see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 9.

9 Insolvency Rules 1986, SI 1986/1925, r 5.18(3).

10 For the meaning of 'associate' see para 5 ante.

11 Insolvency Rules 1986, SI 1986/1925, r 5.18(4).

12 Ie in accordance with ibid r 5.18(3): see supra.

13 Ie for the purposes of ibid r 5.18(4)(c): see text head (iii) supra.

14 As to the debtor's statement of affairs see para 93 ante.

15 Insolvency Rules 1986, SI 1986/1925, r 5.18(5).

16 Ie contrary to *ibid* r 5.16: see para 99 ante.

17 *Ibid* r 5.18(6).

18 *Ibid* r 5.18(7). The applicable provisions regarding such an appeal are rr 5.17(5)-(9) (see para 101 ante): r 5.18(7).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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#### 103. Proceedings to obtain agreement on the proposal.

On the day on which the creditors' meeting is held, it may from time to time be adjourned<sup>1</sup>. If on that day the requisite majority for the approval of the voluntary arrangement<sup>2</sup>, with or without modifications<sup>3</sup>, has not been obtained, the chairman may, and must if it is so resolved, adjourn the meeting for not more than 14 days<sup>4</sup>. If there are subsequently further adjournments, the final adjournment may not be to a day later than 14 days after that on which the meeting was originally held<sup>5</sup>. If following any final adjournment of the meeting the proposal, with or without modifications, is not agreed to, it is deemed rejected<sup>6</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 5.19(1).

2 As to the requisite majorities see para 102 ante.

3 As to the modifications which are permissible see para 100 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 5.19(2). If the meeting is adjourned under r 5.19(2), notice of the fact must be given by the chairman forthwith to the court: r 5.19(4). If a proposal is rejected at the meeting, it cannot be approved at a subsequent meeting: *Re Symes (a debtor), Kent Carpets Ltd v Symes* [1995] 2 BCLC 651, [1995] BCC 137.

5 Insolvency Rules 1986, SI 1986/1925, r 5.19(3).

6 *Ibid* r 5.19(5).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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#### **104. Resolutions to follow approval.**

If the voluntary arrangement is approved, with or without modifications<sup>1</sup>, a resolution may be taken by the creditors, where two or more insolvency practitioners<sup>2</sup> are appointed to act as supervisor<sup>3</sup>, on the question whether acts done in connection with the arrangement may be done by any one of them, or must be done by both or all<sup>4</sup>.

If at the creditors' meeting a resolution is moved for the appointment of some person other than the nominee to be supervisor of the arrangement, there must be produced to the chairman, at or before the meeting, that person's written consent to act, unless he is present and then and there signifies his consent, and his written confirmation that he is qualified to act as an insolvency practitioner in relation to the debtor<sup>5</sup>.

1 As to the modifications which are permissible see para 100 ante.

2 As to insolvency practitioners and their qualification see para 42 et seq ante; but see also para 81 note 6 head (2) ante.

3 As to the supervisor see para 108 et seq post.

4 Insolvency Rules 1986, SI 1986/1925, r 5.20(1).

5 Ibid r 5.20(2).

#### **UPDATE**

#### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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#### **105. Report of creditors' meeting.**

After the conclusion of the creditors' meeting<sup>1</sup>, the chairman of the meeting must report the result of it to the court<sup>2</sup>. The report must be prepared by the person who was chairman of the meeting<sup>3</sup>; and it must:

- 190 (1) state whether the proposal for a voluntary arrangement was approved or rejected and, if approved, with what, if any, modifications<sup>4</sup>;

- 191 (2) set out the resolutions which were taken at the meeting, and the decision on each one;
- 192 (3) list the creditors, with their respective values, who were present or represented at the meeting, and how they voted on each resolution; and
- 193 (4) include such further information, if any, as the chairman thinks it appropriate to make known to the court<sup>5</sup>.

A copy of the chairman's report must, within four days of the meeting being held, be filed in court<sup>6</sup> and the court must cause that copy to be indorsed with the date of filing<sup>7</sup>.

Immediately after a copy of the chairman's report is filed in court, the chairman must give notice of the result of the meeting to all those who were sent notice of the meeting and, where the debtor is an undischarged bankrupt<sup>8</sup>, the official receiver<sup>9</sup> and, if any, the trustee<sup>10</sup>. If the report is that the meeting has declined, with or without modifications, to approve the debtor's proposal, the court may discharge any interim order which is in force in relation to the debtor<sup>11</sup>.

1 In accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 Insolvency Act 1986 s 259(1). Where the court has made an interim order under s 252 (see para 83 ante) in respect of an individual who subsequently dies, s 259 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt III para 3. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

3 Insolvency Rules 1986, SI 1986/1925, r 5.22(1).

4 As to the modifications which are permissible see para 100 ante.

5 Insolvency Rules 1986, SI 1986/1925, r 5.22(2).

6 For the meaning of 'file in court' see para 95 note 10 ante.

7 Insolvency Rules 1986, SI 1986/1925, r 5.22(3).

8 For the meaning of 'bankrupt' see para 84 note 4 ante. As to discharge from bankruptcy see para 629 et seq post.

9 As to the official receiver see para 31 et seq ante.

10 Insolvency Act 1986 s 259(1); Insolvency Rules 1986, SI 1986/1925, rr 5.1(2), 5.22(4) (amended by SI 1987/1919). As to the persons to be sent notice of the meeting see para 97 ante.

11 Insolvency Act 1986 s 259(2). For the prescribed form of alternative order to be made at hearing to consider the chairman's report see the Insolvency Rules 1986, SI 1986/1925, r 12.7(1), (2), Sch 4, Form 5.4 (added by SI 1987/1919). In suitable cases the court will normally be prepared to make a final order on consideration of the chairman's report without attendance if the chairman's report has been filed and complies with the Insolvency Rules 1986, SI 1986/1925, r 5.22(1) (see supra). The order will record the effect of the chairman's report and may discharge the interim order: *Practice Direction-Insolvency Proceedings* para 16.1(4); and see para 16.2.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 105 Report of creditors' meeting

TEXT AND NOTE 10--SI 1986/1925 r 5(2) substituted, r 5(3), (4) added: SI 2003/1730.

NOTE 11--SI 1986/1925 Form 5.4 substituted: SI 2003/1730.

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### **106. Reports to the Secretary of State; register of voluntary arrangements.**

Immediately after the chairman of the creditors' meeting has filed in court<sup>1</sup> a report that the meeting has approved the voluntary arrangement<sup>2</sup>, he must report to the Secretary of State the following details of the arrangement:

- 194 (1) the name and address of the debtor<sup>3</sup>;
- 195 (2) the date on which the arrangement was approved by the creditors;
- 196 (3) the name and address of the supervisor;
- 197 (4) the court in which the chairman's report has been filed<sup>4</sup>.

A person who is appointed to act as supervisor of an individual voluntary arrangement, whether in the first instance or by way of replacement of another person previously appointed<sup>5</sup>, must forthwith give written notice to the Secretary of State of his appointment; and, if he vacates office as supervisor, he must forthwith give written notice of that fact also to the Secretary of State<sup>6</sup>.

The Secretary of State must maintain a register of individual voluntary arrangements and must enter in it all such matters as are reported to him in pursuance of the statutory provisions<sup>7</sup> and orders of suspension<sup>8</sup> reported<sup>9</sup> to him<sup>10</sup>; and the register must be open to public inspection<sup>11</sup>.

1 For the meaning of 'file in court' see para 95 note 10 ante.

2 See para 105 ante.

3 For the meaning of 'the debtor' see para 82 note 2 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 5.24(1).

5 Ie under the Insolvency Act 1986 s 256(3)(a) (see para 96 head (1) ante) or s 258(3) (see para 100 ante).

6 Insolvency Rules 1986, SI 1986/1925, r 5.24(2).

7 Ie in pursuance of ibid r 5.24 (as amended) (see supra) and r 5.29 (as amended) (see para 122 post).

8 Ie made under the Insolvency Act 1986 s 262: see para 120 post.

9 Ie in pursuance of the Insolvency Rules 1986, SI 1986/1925, r 5.25 (as amended): see para 121 post.

10 Ibid r 5.23(1) (amended by SI 1987/1919; SI 1999/359). Where the Secretary of State has received notice of the making of a revocation order or that an arrangement has been fully implemented in pursuance of the Insolvency Rules 1986, SI 1986/1925, r 5.25 (as amended) or r 5.29 (as amended) or has otherwise received written notice of the termination of an arrangement from the supervisor, and: (1) the revocation order under the Insolvency Act 1986 s 262 was made prior to 22 March 1999; or (2) the final completion or termination of the arrangement occurred more than two years prior to that date, the Secretary of State must delete from the register all matters entered in it relating to such arrangement: Insolvency Rules 1986, SI 1986/1925, r 5.23(1A) (added by SI 1999/359). Where the Secretary of State receives notice under the Insolvency Rules 1986, SI

1986/1925, r 5.25(5) (as amended) of the making of a revocation order in respect of an individual voluntary arrangement of which entry is made in the register, he must delete from the register all matters entered in it relating to that arrangement: r 5.23(1B) (added by SI 1999/359). Where the Secretary of State receives notice under the Insolvency Rules 1986, SI 1986/1925, r 5.29(3) (as amended) of the full implementation or termination of an individual voluntary arrangement of which entry is made in the register, he must, on the expiry of two years after the final completion or termination of such individual voluntary arrangement, delete from the register all matters entered in it relating to that arrangement: r 5.23(1C) (added by SI 1999/359).

11 Insolvency Rules 1986, SI 1986/1925, r 5.23(2).

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### **106 Reports to the Secretary of State; register of voluntary arrangements**

TEXT AND NOTES--SI 1986/1925 rr 5.23, 5.24 revoked: SI 2002/2712.

TEXT AND NOTES 7-11--The Secretary of State is required to create and maintain a register of matters relating to bankruptcies, debt relief orders and individual voluntary arrangements ('the individual insolvency register'), which must be open to public inspection: Insolvency Rules 1986, SI 1986/1925 Pt 6A Ch 1 (r 6A.1) (Pt 6A added by SI 2003/1730; and amended by SI 2004/584, SI 2005/527, SI 2009/642, SI 2010/686). As to the information to be entered onto and deleted from the individual insolvency register, see SI 1986/1925 Pt 6A Ch 2 (rr 6A.2-6A.5B) (as so added and amended). As to the information to be entered onto and deleted from the debt relief restrictions register, see SI 1986/1925 Pt 6A Ch 3A (rr 6A.7A-6A.7B) (added by SI 2009/642). The Secretary of State must rectify any inaccuracies in the register: SI 1986/1925 Pt 6A Ch 4 (r 6A.8) (added by SI 2003/1730; and amended by SI 2009/642).

NOTE 11--As to the fee payable on the registration of an individual voluntary arrangement, Fee IVA1, see the Insolvency Proceedings (Fees) Order 2004, SI 2004/593, Sch 2 para 2 (amended by SI 2009/645).

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## **(v) Effect and Implementation of the Arrangement; the Supervisor**

### **107. Effect of approval.**

Where the meeting of creditors<sup>1</sup> approves the proposed voluntary arrangement, with or without modifications<sup>2</sup>, the approved arrangement:

- 198 (1) takes effect as if made by the debtor<sup>3</sup> at the meeting<sup>4</sup>; and
- 199 (2) binds every person who<sup>5</sup> had notice of, and was entitled to vote at, the meeting, whether or not he was present or represented at it, as if he were a party to the arrangement<sup>6</sup>.

Any interim order in force in relation to the debtor immediately before the end of the period of 28 days beginning with the day on which the report with respect to the creditors' meeting was made to the court<sup>7</sup> ceases to have effect at the end of that period<sup>8</sup>. Where proceedings on a bankruptcy petition have been stayed by an interim order which so ceases to have effect, that petition is deemed, unless the court otherwise orders, to have been dismissed<sup>9</sup>.

Where, however, the creditors' meeting approves the proposed voluntary arrangement, with or without modifications, and the debtor is an undischarged bankrupt<sup>10</sup>, the court may do one or both of the following, namely:

- 200 (a) annul the bankruptcy order<sup>11</sup> by which he was adjudged bankrupt;
- 201 (b) give such directions with respect to the conduct of the bankruptcy and the administration of the bankrupt's estate as it thinks appropriate for facilitating the implementation of the approved voluntary arrangement<sup>12</sup>;

but the court may not so annul a bankruptcy order at any time before the end of the period of 28 days beginning with the day on which the report of the creditors' meeting was made to the court<sup>13</sup>, or at any time when an application challenging the decision of the meeting<sup>14</sup> or an appeal in respect of such an application is pending or at any time in the period within which such an appeal may be brought<sup>15</sup>.

1 le summoned under the Insolvency Act 1986 s 257: see para 97 ante.

2 As to the modifications which are permissible see para 100 ante.

3 For the meaning of 'the debtor' see para 82 note 2 ante.

4 Insolvency Act 1986 s 260(1), (2)(a).

5 le in accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended). For the rules relating to notice of the meeting see para 97 ante; and for the rules relating to entitlement to vote see para 101 ante. As to what constitutes notice of the meeting see para 97 note 14 ante.

6 Insolvency Act 1986 s 260(1), (2)(b). Approval of the arrangement gives rise to a form of statutory contract: see *Davis v Martin-Sklan* [1995] 2 BCLC 483, [1995] BCC 1122. Thus, whether a voluntary arrangement has the effect of releasing a jointly liable co-debtor depends on whether, as a matter of construction of the voluntary arrangement, it constitutes an absolute release in relation to all the joint debtors or a release with a reservation: *Johnson v Davies* [1999] Ch 117, [1998] 2 All ER 649, CA. The Deeds of Arrangement Act 1914 (see para 859 et seq post) does not apply to the approved voluntary arrangement: Insolvency Act 1986 s 260(3). Where the court has made an interim order under s 252 (see para 83 ante) in respect of an individual who subsequently dies, s 260 applies with the modification that it ceases to apply on or after the death of the individual: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch I Pt III para 4. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

As from such day as the Secretary of State may by order made by statutory instrument appoint for the Insolvency Act 1986 s 260(2)(b) there is to be substituted:

29 '(b) binds every person who in accordance with the rules:

13. (i) was entitled to vote at the meeting (whether or not he was present or represented at it), or  
13

14. (ii) would have been so entitled if he had had notice of it,  
14

30 as if he were a party to the arrangement;

31 (2A) If:

15. (a) when the arrangement ceases to have effect any amount payable under the arrangement to a person by virtue of subsection (2)(b)(ii) has not been paid, and

- 15
16. (b) the arrangement did not come to an end prematurely,  
16
- 32 the debtor shall at that time become liable to pay to that person the amount payable under the arrangement':
- Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 10. At the date at which this volume states the law no such day had been appointed.
- 7 le under the Insolvency Act 1986 s 259: see para 105 ante.
- 8 Ibid s 260(4). Section 260(4) applies except to such extent as the court may direct for the purposes of any application under s 262 (see paras 118-120 post): s 260(4).
- 9 Ibid s 260(5).
- 10 For the meaning of 'bankrupt' see para 82 note 3 ante. As to discharge from bankruptcy see para 629 et seq post.
- 11 As to bankruptcy orders see para 195 et seq post; and as to the annulment of bankruptcy orders see para 610 et seq post.
- 12 Insolvency Act 1986 s 261(1). Where the court has made an interim order under s 252 (see para 83 ante) in respect of an individual who subsequently dies, s 261 applies with the modification that it ceases to apply on or after the death of the individual: Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch I Pt III para 4.
- The Insolvency Rules 1986, SI 1986/1925, rr 6.206-6.212 (as amended) (see para 615 et seq post) apply to an application for annulment under the Insolvency Act 1986 s 261 as they apply to an application under s 282(1) (a) (see para 610 head (1) post): Insolvency Rules 1986, SI 1986/1925, r 6.212A (added by SI 1987/1919). For the prescribed form of alternative orders to be made at hearing to consider the chairman's report see the Insolvency Rules 1986, SI 1986/1925, r 12.7(1), (2), Sch 4, Form 5.4 (added by SI 1987/1919).
- 13 See note 5 supra.
- 14 le under the Insolvency Act 1986 s 262: see paras 118-120 post.
- 15 Ibid s 261(2).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 107 Effect of approval

NOTE 6--Day now appointed: SI 2002/2711. The fact that a mortgagee makes a claim and accepts a dividend does not require it to be treated as having elected to abandon its security for any part of the mortgage debt that is secured: *Whitehead v Household Mortgage Corp'n plc* [2002] EWCA Civ 1657, [2003] 1 All ER 319.

TEXT AND NOTES 10-15--Replaced.

Where the creditors' meeting summoned under the Insolvency Act 1986 s 257 approves the proposed voluntary arrangement, with or without modifications, and the debtor is an undischarged bankrupt the court must annul the bankruptcy order on an application made by the bankrupt, or where the bankrupt has not made an application within the prescribed period, by the official receiver: s 261(1), (2) (s 261 substituted by the Enterprise Act 2002 Sch 22 para 1). Such an application may not be made (1)



during the period specified in the 1986 Act s 262(3)(a) during which the decision of the creditors' meeting can be challenged by application under s 262 (see PARAS 118, 119); (2) while an application under that s 262 is pending; or (3) while an appeal in respect of an application under s 262 is pending or may be brought: s 261(3). Where the creditors' meeting summoned under s 257 approves the proposed voluntary arrangement, with or without modifications, and the debtor is an undischarged bankrupt the court may give such directions about the conduct of the bankruptcy and the administration of the bankrupt's estate as it thinks appropriate for facilitating the implementation of the approved voluntary arrangement: s 261(4). The Insolvency Rules 1986, SI 1986/1925, Pt 5 Chs 8, 9, 11 (rr 5.51-5.56, 5.60, 61) (added by SI 2003/1730; SI 1986/1925 r 5.60 amended by SI 2005/527, SI 2009/642) contain further provisions in relation to an application for an annulment of a bankruptcy order under the 1986 Act s 261(2).

SI 1986/1925 r 6.212A revoked: SI 2003/1730.

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### **108. The supervisor.**

Where a voluntary arrangement approved by the meeting of creditors<sup>1</sup> has taken effect<sup>2</sup>, the person who is for the time being carrying out, in relation to the voluntary arrangement, the functions conferred by virtue of the approval on the nominee, or his replacement<sup>3</sup>, is to be known as the supervisor of the voluntary arrangement<sup>4</sup>.

The supervisor may apply to the court<sup>5</sup> for directions in relation to any particular matter arising under the voluntary arrangement<sup>6</sup>.

1    Ie the meeting summoned under the Insolvency Act 1986 s 257: see para 97 ante.

2    As to when a voluntary arrangement takes effect see para 107 ante.

3    Ie under the Insolvency Act 1986 s 256(3)(a) (see para 96 head (1) ante) or s 258(3) (see para 100 ante).

4    Ibid s 263(1), (2). As to the supervisor's duty to register certificates relating to the security to be provided by him see para 55 ante; and as to the appointment of supervisors by the court see para 111 post.

As from such day as the Secretary of State may by order made by statutory instrument appoint in s 263(2) for the word '256(3)(a)' there are to be substituted the words '256(3), 256A(4)': Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 13(a). At the date at which this volume states the law no such day had been appointed.

5    As to the mode of application and the procedure see para 764 et seq post.

6    Insolvency Act 1986 s 263(4). As to the supervisor's power to present a petition for a bankruptcy order see para 124 post.

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

## **108 The supervisor**

NOTE 4--Day now appointed: SI 2002/2711.

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### **109. Supervisor to be insolvency practitioner.**

A person who acts as supervisor of a voluntary arrangement under Part VIII of the Insolvency Act 1986<sup>1</sup> must be qualified to act as an insolvency practitioner in relation to the individual<sup>2</sup>.

1     le under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 ante and para 110 et seq post.

2     Ibid s 388(2)(c). As to insolvency practitioners and their qualification see para 42 et seq ante; but see para 81 note 6 head (2) ante.

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### **109 Supervisor to be insolvency practitioner**

TEXT AND NOTES--The official receiver is authorised to act as nominee or supervisor in relation to a voluntary arrangement approved under the Insolvency Act 1986 Pt VIII provided that the debtor is an undischarged bankrupt when the arrangement is proposed: s 389B(1) (s 389B added by the Enterprise Act 2002 Sch 22). The Secretary of State may by order repeal the proviso in the 1986 Act s 389B(1): s 389B(2). An order repealing the proviso must be made by statutory instrument, and is subject to annulment in pursuance of a resolution of either House of Parliament: s 389B(3).

NOTE 2--Nothing in the 1986 Act s 388 applies to anything done (whether in the United Kingdom or elsewhere) in relation to insolvency proceedings under EC Council Regulation 1346/2000 in a member state other than the United Kingdom: 1986 Act s 388(6) (added by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240).

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### 110. Control by the court.

If the debtor<sup>1</sup>, any of his creditors or any other person is dissatisfied by any act, omission or decision of the supervisor, he may apply to the court<sup>2</sup>; and on such an application the court may:

- 202 (1) confirm, reverse or modify any act or decision of the supervisor;
- 203 (2) give him directions; or
- 204 (3) make such other order as it thinks fit<sup>3</sup>.

The supervisor may apply to court for directions in relation to any particular matter arising under the voluntary arrangement<sup>4</sup>.

1 For the meaning of 'the debtor' see para 82 note 2 ante.

2 As to the mode of application and the procedure see para 764 et seq post.

3 Insolvency Act 1986 s 263(3). Section 263 provides a self-contained procedure allowing the court to deal with complaints about a supervisor's conduct and, therefore, there is no private law right of action for creditors for breach of statutory duty against a supervisor: *King v Anthony* [1998] 2 BCLC 517, CA; and see *Heritage Joinery (a firm) v Krasner* [1999] BPIR 683; *Pitt v Mond* [2001] BPIR 624. Where the court has made an interim order under the Insolvency Act 1986 s 252 (see para 83 ante) in respect of an individual who subsequently dies, s 263 applies with the modification that, where the individual dies after a voluntary arrangement has been approved, then in s 263(3), for the words 'debtor, any of his' there are to be substituted the words 'personal representative of the deceased debtor, any of the deceased debtor's': and the supervisor must give notice to the court that the individual has died: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch I Pt III para 5. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 Insolvency Act 1986 s 263(4). See eg *Davis v Martin-Sklan* [1995] 2 BCLC 483, [1995] BCC 1122. As to the effect on a voluntary arrangement where a bankruptcy order is made see further para 123 post.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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### 111. Appointment of supervisor by the court.

Whenever it is expedient to appoint a person to carry out the functions of the supervisor and it is inexpedient, difficult or impracticable for an appointment to be made without the assistance of the court, the court may make an order appointing a person who is qualified to act as an insolvency practitioner in relation to the debtor<sup>1</sup>, either in substitution for the existing supervisor or to fill a vacancy<sup>2</sup>.

Such power is exercisable so as to increase the number of persons exercising the functions of the supervisor or, where there is more than one person exercising those functions, so as to replace one or more of those persons<sup>3</sup>.

1 As to insolvency practitioners and their qualification see para 42 et seq ante; but see also para 81 note 6 head (2) ante. For the meaning of 'the debtor' see para 82 note 2 ante.

2 Insolvency Act 1986 s 263(5). As to the procedure for the replacement of an outgoing insolvency practitioner see para 80 ante. Section 263(5) is without prejudice to the Trustee Act 1925 s 41(2) (power of court to appoint trustees of deeds of arrangement: see para 880 post): Insolvency Act 1986 s 263(5). As to deeds of arrangements under the Deeds of Arrangement Act 1914 generally see para 859 et seq post. For a further power of the court to appoint a supervisor see the Insolvency Act 1986 s 273(2); and para 200 post. The court has jurisdiction to appoint a new supervisor to one or more voluntary arrangements as part of a 'composite' application replacing an insolvency practitioner in relation to all appointments held by him: see *Supperstone v Auger* [1999] BPIR 152; *Re Equity Nominees Ltd* [1999] 2 BCLC 19. As to the procedure for making a 'composite' application see *Practice Direction-Insolvency Proceedings* para 1.6; and para 80 ante.

As from such day as the Secretary of State may by order made by statutory instrument appoint in the Insolvency Act 1986 s 263(5) for the words 'in relation to the debtor' there are to be substituted the words 'or authorised to act as supervisor in relation to the voluntary arrangement': Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 13(b). At the date at which this volume states the law no such day had been appointed.

3 Insolvency Act 1986 s 263(6).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 111 Appointment of supervisor by the court

NOTE 2--Day now appointed: SI 2002/2711. See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

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### 112. Hand-over of property to supervisor; transactions defrauding creditors.

Forthwith after the approval of the voluntary arrangement, the debtor<sup>1</sup>, if he is not a bankrupt<sup>2</sup>, and the official receiver<sup>3</sup> or trustee<sup>4</sup> if the debtor is an undischarged<sup>5</sup> bankrupt, must do all that is required for putting the supervisor into possession of the assets included in the arrangement<sup>6</sup>.

Where the debtor is an undischarged bankrupt, the supervisor must, on taking possession of the assets, discharge any balance due to the official receiver<sup>7</sup> and, if other, the trustee<sup>8</sup> by way of remuneration or on account of fees, costs, charges and expenses properly incurred and payable<sup>9</sup> and any advances made in respect of the insolvent estate<sup>10</sup>, together with interest on such advances at the specified rate<sup>11</sup> at the date of the bankruptcy order<sup>12</sup>. Alternatively, where

the debtor is an undischarged bankrupt, the supervisor must, before taking possession, give the official receiver or the trustee a written undertaking to discharge any such balance out of the first realisation of assets<sup>13</sup>. Where the debtor is an undischarged bankrupt, the official receiver and, if other, the trustee has a charge on the assets included in the voluntary arrangement in respect of any sums due as above until they have been discharged, subject only to the deduction from realisations by the supervisor of the proper costs and expenses of realisation; and any sums due to the official receiver take priority over those due to a trustee<sup>14</sup>. The supervisor must from time to time out of the realisation of assets discharge all guarantees properly given by the official receiver or the trustee for the benefit of the estate, and must pay all their expenses<sup>15</sup>.

The supervisor has power to apply to the court for an order under the provisions relating to transactions defrauding creditors where the victim of the transaction is bound by a voluntary arrangement<sup>16</sup>.

1 For the meaning of 'the debtor' see para 82 note 2 ante.

2 For the meaning of 'bankrupt' see para 84 note 4 ante.

3 As to the official receiver see para 31 et seq ante.

4 As to the trustee see para 316 et seq post.

5 As to discharge from bankruptcy see para 629 et seq post.

6 Insolvency Rules 1986, SI 1986/1925, rr 5.1(2), 5.21(1).

7 As to the official receiver's fees, costs, charges and expenses see paras 39, 41 ante.

8 As to the trustee's fees, costs, charges and expenses see para 351 et seq post.

9 Ie under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

10 For the meaning of 'the insolvent estate' see para 91 note 18 ante.

11 Ie the rate specified in the Judgments Act 1838 s 17 (as amended): see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1307.

12 Insolvency Rules 1986, SI 1986/1925, rr 5.1(2), 5.21(2).

13 Ibid rr 5.1(2), 5.21(3).

14 Ibid rr 5.1(2), 5.21(4).

15 Ibid r 5.21(5).

16 See the Insolvency Act 1986 s 424(1)(b); and para 665 head (2) post. As to transactions defrauding creditors generally see para 663 et seq post.

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### **112 Hand-over of property to supervisor; transactions defrauding creditors**

TEXT AND NOTES 6, 12-14--SI 1986/1925 r 5(2) substituted, r 5(3), (4) added: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(v) Effect and Implementation of the Arrangement; the Supervisor/113. Power to ensure continuation of essential supplies by utilities.

### **113. Power to ensure continuation of essential supplies by utilities.**

Where on any day ('the relevant day') a voluntary arrangement proposed by an individual is approved<sup>1</sup>, and if a request is made by or with the concurrence of the supervisor<sup>2</sup> and for the purposes of any business<sup>3</sup> which is or has been carried on by the individual, by a firm or partnership of which the individual is or was a member, or by an agent or manager for the individual or for such a firm or partnership for the giving after the relevant day of:

- 205 (1) a supply of gas by a gas supplier<sup>4</sup>;
- 206 (2) a supply of electricity by an electricity supplier<sup>5</sup>;
- 207 (3) a supply of water by a water undertaker; or
- 208 (4) a supply of telecommunication services<sup>6</sup> by a public telecommunications operator<sup>6</sup>,

the supplier:

- 209 (a) may make it a condition of the giving of the supply that the supervisor personally guarantees the payment of any charges in respect of the supply; but
- 210 (b) must not make it a condition of the giving of the supply that any outstanding charges in respect of a supply given to the individual before the relevant day are paid<sup>7</sup>.

1    Ie under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante and para 114 et seq post.

2    The provisions of *ibid* s 372 (as amended) apply also where: (1) a bankruptcy order is made against an individual (see paras 262, 467 post) or an interim receiver of an individual's property is appointed (see para 230 post); or (2) a deed of arrangement is made for the benefit of an individual's creditors (see para 881 post); and in such cases references to 'the supervisor' should be read as references to the official receiver, the trustee in bankruptcy, the interim receiver or the trustee under the deed of arrangement, as the case may be: see s 372(1).

3    For the meaning of 'business' see para 81 note 4 ante.

4    Ie within the meaning of the Gas Act 1986 Pt 1 (ss 1-48) (as amended): see FUEL AND ENERGY vol 19(2) (2007 Reissue) para 807.

5    Ie within the meaning of the Electricity Act 1989 Pt I (ss 1-64) (as amended): see FUEL AND ENERGY vol 19(2) (2007 Reissue) para 1065.

6    For these purposes, 'telecommunication services' and 'public telecommunications operator' mean the same as in the Telecommunications Act 1984 (see TELECOMMUNICATIONS vol 97 (2010) PARA 59), except that the former does not include local delivery services within the meaning of the Broadcasting Act 1990 Pt II (ss 72-82 (as amended): Insolvency Act 1986 s 372(5)(c) (amended by the Broadcasting Act 1990 s 203(1), Sch 20 para 43).

7    Insolvency Act 1986 s 372(1)-(4) (amended by the Electricity Act 1989 s 112(1), Sch 16 para 35(1), (3)(a)); the Water Act 1989 s 190(1), Sch 25 para 78(1); the Gas Act 1995 s 16(1), Sch 4 para 14(3); the Utilities Act 2000 s 51(2), Sch 6 para 47(1), (3)(a)). In the case of the administration in bankruptcy of the insolvent estate of

a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 372 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### **113 Power to ensure continuation of essential supplies by utilities**

TEXT AND NOTES--Insolvency Act 1986 s 372 further amended: Communications Act 2003 Sch 17 para 82(3).

NOTE 6--1990 Act Pt II ss 72-82 repealed: Communications Act 2003 s 406(7), Sch 19(1).

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### **114. Supervisor's accounts and reports.**

Where the voluntary arrangement authorises or requires the supervisor:

- 211 (1) to carry on the debtor's<sup>1</sup> business or to trade on his behalf or in his name; or
- 212 (2) to realise assets of the debtor, or where the debtor is an undischarged bankrupt<sup>2</sup>, belonging to the estate<sup>3</sup>; or
- 213 (3) otherwise to administer or dispose of any funds of the debtor or the estate,

he must keep accounts and records of his acts and dealings in and in connection with the arrangement, including, in particular, records of all receipts and payments of money<sup>4</sup>.

The supervisor must, not less often than once in every 12 months beginning with the date of his appointment, prepare an abstract of such receipts and payments, and send copies of it, accompanied by his comments on the progress and efficacy of the arrangement, to the court, the debtor and all those of the debtor's creditors who are bound by the arrangement<sup>5</sup>. If in any period of 12 months he has, however, made no payments and had no receipts, he must at the end of that period send a statement to that effect to all the persons specified above<sup>6</sup>.

An abstract provided under the above provisions must relate to a period beginning with the date of the supervisor's appointment or, as the case may be, the day following the end of the last period for which an abstract was prepared under these provisions; and copies of the abstract must be sent out, as required by the above provisions, within two months following the end of the period to which the abstract relates<sup>7</sup>.

If the supervisor is not authorised as mentioned above<sup>8</sup>, he must, not less often than once in every 12 months beginning with the date of his appointment, send to all those specified above

a report on the progress and efficacy of the voluntary arrangement<sup>9</sup>. On application by the supervisor, the court may vary the dates on which the obligation to send abstracts or reports arises<sup>10</sup>.

- 1 For the meaning of 'the debtor' see para 82 note 2 ante.
- 2 For the meaning of 'bankrupt' see para 84 note 4 ante. As to discharge from bankruptcy see para 629 et seq post.
- 3 For the meaning of 'estate' see para 84 note 10 ante.
- 4 Insolvency Rules 1986, SI 1986/1925, rr 5.1(2), 5.26(1). As to the records to be kept by insolvency practitioners generally see para 76 ante.
- 5 Ibid r 5.26(2). As to the persons who are bound by the voluntary arrangement see para 107 head (2) ante.
- 6 Ibid r 5.26(2).
- 7 Ibid r 5.26(3).
- 8 Ie as mentioned in ibid r 5.26(1): see supra.
- 9 Ibid r 5.26(4).
- 10 Ibid r 5.26(5). As to the mode of application and the procedure see para 764 et seq post.

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### **114 Supervisor's accounts and reports**

TEXT AND NOTE 4--SI 1986/1925 r 5(2) substituted, r 5(3), (4) added: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(v) Effect and Implementation of the Arrangement; the Supervisor/115. Production of accounts and records to the Secretary of State.

### **115. Production of accounts and records to the Secretary of State.**

The Secretary of State may at any time during the course of the voluntary arrangement or after its completion require the supervisor to produce for inspection his records and accounts in respect of the arrangement and copies of abstracts and reports<sup>1</sup>. The Secretary of State may require production either at the premises of the supervisor or elsewhere; and it is the duty of the supervisor to comply with any requirement imposed on him under these provisions<sup>2</sup>.

The Secretary of State may cause any accounts and records produced to him under the above provisions to be audited; and the supervisor must give to the Secretary of State such further information and assistance as he needs for the purpose of his audit<sup>3</sup>.



1 Insolvency Rules 1986, SI 1986/1925, r 5.27(1). The copies of abstracts and reports are those prepared in compliance with r 5.26 (see para 114 ante): r 5.27(1).

2 Ibid r 5.27(2).

3 Ibid r 5.27(3).

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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#### **116. Fees, costs, charges and expenses.**

The fees, costs, charges and expenses that may be incurred for any purposes of the voluntary arrangement are:

- 214 (1) any disbursements made by the nominee<sup>1</sup> prior to the approval of the arrangement, and any remuneration for his services as such agreed between himself and the debtor<sup>2</sup>, the official receiver<sup>3</sup> or the trustee<sup>4</sup>;
- 215 (2) any fees, costs, charges and expenses which are sanctioned by the terms of the arrangement or would be payable, or correspond to those which would be payable, in the debtor's bankruptcy<sup>5</sup>.

1 For the meaning of 'the nominee' see para 81 ante.

2 For the meaning of 'the debtor' see para 82 note 2 ante.

3 As to the official receiver see para 31 et seq ante.

4 As to the trustee see para 316 et seq post.

5 Insolvency Rules 1986, SI 1986/1925, r 5.28. As to the fees, costs, charges or expenses payable in a bankruptcy see para 576 post.

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

#### **116 Fees, costs, charges and expenses**

TEXT AND NOTES--SI 1986/1925 r 5.28 revoked: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(vi) Prosecution of Delinquent Debtors/117. Prosecution of delinquent debtors.

## **(vi) Prosecution of Delinquent Debtors**

### **117. Prosecution of delinquent debtors.**

Where a voluntary arrangement approved by a creditors' meeting which has been duly summoned<sup>1</sup> has taken effect and it appears to the nominee<sup>2</sup> or supervisor<sup>3</sup> that the debtor<sup>4</sup> has been guilty of any offence in connection with the arrangement for which he is criminally liable, he must forthwith:

- 216 (1) report the matter to the Secretary of State, and
- 217 (2) provide the Secretary of State with such information and give the Secretary of State such access to and facilities for inspecting and taking copies of documents, being information or documents in his possession or under his control and relating to the matter in question, as the Secretary of State requires<sup>5</sup>.

Where a prosecuting authority<sup>6</sup> institutes criminal proceedings following any such report, the nominee or, as the case may be, supervisor must give the authority all assistance in connection with the prosecution which he is reasonably able to give<sup>7</sup>; and the court may, on the application of the prosecuting authority, direct a nominee or supervisor to comply with that requirement if he has failed to do so<sup>8</sup>.

1 le under the Insolvency Act 1986 s 257: see para 97 ante.

2 For the meaning of 'the nominee' see para 81 ante.

3 For the meaning of 'the supervisor' see para 81 ante.

4 For the meaning of 'the debtor' see para 82 note 2 ante.

5 Insolvency Act 1986 s 262B(1), (2) (added by the Insolvency Act 2000 s 3, Sch 3 paras 1, 12). The Insolvency Act 2000 Sch 3 paras 1, 12 come into force on such day as the Secretary of State may by order made by statutory instrument appoint: s 16(1), (3). At the date at which this volume states the law no such day had been appointed.

6 For these purposes, 'prosecuting authority' means the Director of Public Prosecutions or the Secretary of State: Insolvency Act 1986 s 262B(3) (added by the Insolvency Act 2000 Sch 3 paras 1, 12). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1066, 1079 et seq. See also note 5 supra.

7 Insolvency Act 1986 s 262B(3) (as added: see note 6 supra). See also note 5 supra.

8 Ibid s 262B(4) (added by the Insolvency Act 2000 Sch 3 paras 1, 12). See also note 5 supra.

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### **117 Prosecution of delinquent debtors**

NOTE 5--Day now appointed: SI 2002/2711.

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### **(vii) Challenge of Decisions; Revocation or Suspension of the Arrangement**

#### **118. Grounds for challenge.**

An application to the court<sup>1</sup> may be made by any of certain specified persons<sup>2</sup>, on one or both of the following grounds, namely:

- 218 (1) that a voluntary arrangement approved by a creditors' meeting<sup>3</sup> unfairly prejudices the interests of a creditor of the debtor<sup>4</sup>;
- 219 (2) that there has been some material irregularity at or in relation to such a meeting<sup>5</sup>.

1 As to the mode of application and the procedure see para 764 et seq post.

2 Ie the persons specified in the Insolvency Act 1986 s 262(2): see para 119 post.

3 Ie summoned under ibid s 257: see para 97 ante.

4 For the meaning of 'the debtor' see para 82 note 2 ante.

5 Insolvency Act 1986 s 262(1). Inadequate investigation by the nominee of the debtor's affairs will not amount to unfair prejudice: *Re a Debtor (No 574 of 1995)* [1998] 2 BCLC 124, [1998] BPIR 224. The precise boundary of unfair prejudice is unclear: *Cadbury Schweppes plc v Somji* [2001] 1 WLR 615, sub nom *Somji v Cadbury Schweppes plc* [2001] BCLC 498, CA. In determining whether an arrangement is unfairly prejudicial, the prejudice must arise from the arrangement itself. A material irregularity in the debtor's proposal or statement of affairs could constitute a material irregularity for the purposes of the Insolvency Act 1986 s 262(1) (b): see text head (2) supra. Material irregularity is not confined to irregularities in the manner the meeting is convened or conducted: *Re a Debtor (No 87 of 1993)(No 2)* [1996] 1 BCLC 63, [1996] BCC 80. A secret deal with one or more of a debtor's creditors, even if not offered by the debtor himself, can amount to a material irregularity: *Cadburys Schweppes plc v Somji* supra. The fact that all creditors are treated in the same way is not necessarily conclusive of the absence of unfair prejudice. A creditor with rights under the Third Persons (Rights against Insurers) Act 1930 (see para 420 post; and INSURANCE vol 25 (2003 Reissue) para 679 et seq) could be unfairly prejudiced if the effect of the arrangement was to remove his rights: *Sea Voyager Maritime Inc v Bielecki (t/a Hughes Hooker & Co)* [1999] 1 All ER 628, [1999] 1 BCLC 133. The existence of differential treatment in an arrangement is not by itself sufficient to prove unfair prejudice; the court must consider all the circumstances: *Re a Debtor (No 101 of 1999)* [2000] BPIR 998; and see *Re a Debtor (No 488 IO of 1996)*, *JP v Debtor* [1999] 2 BCLC 571, [1999] 2 FCR 637 (a wife can be unfairly prejudiced where she is bound by an arrangement to accept a dividend in satisfaction of a matrimonial debt which would otherwise not be discharged in a bankruptcy); *Re Naeem (a bankrupt) (No 18 of 1988)* [1990] 1 WLR 48 (landlord not unfairly prejudiced by an arrangement because he retained a right of forfeiture, even though claim for rent is compromised).

Where the court has made an interim order under the Insolvency Act 1986 s 252 (see para 83 ante) in respect of an individual who subsequently dies, s 262 applies with the modification that it ceases to apply on or after the death of the individual: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch I Pt III para 4. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 118 Grounds for challenge

NOTE 5--The test for material irregularity is whether, objectively assessed, the error or omission is likely to make a material difference to the way in which the creditors consider and assess the terms of a proposal: *Monecor (London) Ltd v Ahmed* [2008] BPIR 458. See also *Tradition (UK) Ltd v Ahmed* [2008] EWHC 2946 (Ch), [2008] All ER (D) 72 (Dec).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(vii) Challenge of Decisions; Revocation or Suspension of the Arrangement/119. Who may apply and when.

### 119. Who may apply and when.

The persons who may apply to the court<sup>1</sup> are:

- 220 (1) the debtor<sup>2</sup>;
- 221 (2) a person entitled<sup>3</sup> to vote at the creditors' meeting<sup>4</sup>;
- 222 (3) the nominee or his replacement<sup>5</sup>; and
- 223 (4) if the debtor is an undischarged bankrupt<sup>6</sup>, the trustee<sup>7</sup> of his estate<sup>8</sup> or the official receiver<sup>9</sup>.

Such an application may not be made, however, after the end of the period of 28 days beginning with the day on which the report of the creditors' meeting was made<sup>10</sup> to the court<sup>11</sup>.

1 le under the Insolvency Act 1986 s 262: see infra; and para 118 ante.

2 Ibid s 262(2)(a). For the meaning of 'the debtor' see para 82 note 2 ante. Where the court has made an interim order under s 252 (see para 83 ante) in respect of an individual who subsequently dies, s 262 applies with the modification that it ceases to apply on or after the death of the individual: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch I Pt III para 4. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

3 le in accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended).

4 Insolvency Act 1986 s 262(2)(b). See also note 2 supra. As from such day as the Secretary of State may by order made by statutory instrument appoint for s 262(2)(b) there is to be substituted:

33 '(b) a person who:

17. (i) was entitled, in accordance with the rules, to vote at the creditors' meeting, or  
17

18. (ii) would have been so entitled if he had had notice of it':  
18

Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 11(1). At the date at which this volume states the law no such day had been appointed.

5 Insolvency Act 1986 s 262(2)(c). See also note 2 supra. As to the nominee's replacement see s 256(3)(a) (cited in para 96 head (1) ante) and s 258(3) (cited in para 100 ante).

6 For the meaning of 'bankrupt' see para 84 note 4 ante. As to discharge from bankruptcy see para 629 et seq post.

7 As to the trustee see para 316 et seq post.

8 For the meaning of 'estate' see para 84 note 10 ante.

9 Insolvency Act 1986 s 262(2)(d). See also note 2 supra. As to the official receiver see para 31 et seq ante.

10 le under ibid s 259: see para 105 ante.

11 Ibid s 262(3). The court has jurisdiction to extend the time for making an application under the Insolvency Act 1986 s 262: *Tager v Westpac Banking Corp* [1997] 1 BCLC 313, [1997] BPIR 543; cf *Re Bournemouth & Boscombe Athletic Football Club Co Ltd* [1998] BPIR 183.

As from such day as the Secretary of State may by order made by statutory instrument appoint the Insolvency Act 1986 s 262(3) is to be amended as follows:

34 (1) after the words 'be made' there is to be inserted '(a)';

35 (2) at the end there is to be inserted:

36 'or

37 (b) in the case of a person who was not given notice of the creditors' meeting, after the end of the period of 28 days beginning with the day on which he became aware that the meeting had taken place,

but (subject to that) an application made by a person within subsection (2)(b)(ii) on the ground that the arrangement prejudices his interests may be made after the arrangement has ceased to have effect, unless it has come to an end prematurely':

Insolvency Act 2000 Sch 3 paras 1, 11(2). At the date at which this volume states the law no such day had been appointed.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

### 119 Who may apply and when

NOTE 11--As to factors to be considered by the court when exercising its discretion to extend the period within which an application can be made see *Warley Continental Services Ltd v Johal* [2002] All ER (D) 224 (Oct).

Day now appointed: SI 2002/2711.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(5) INDIVIDUAL VOLUNTARY ARRANGEMENTS/(vii) Challenge of Decisions; Revocation or Suspension of the Arrangement/120. Powers of the court.

## 120. Powers of the court.

Where, on an application challenging the decision of a creditor's meeting<sup>1</sup>, the court is satisfied as to either of the specified grounds<sup>2</sup>, it may do one or both of the following, namely:

- 224 (1) revoke or suspend any approval given by the meeting<sup>3</sup>;
- 225 (2) give a direction to any person for the summoning of a further meeting of the debtor's<sup>4</sup> creditors to consider any revised proposal he may make, or in a case where there has been some material irregularity at or in relation to the meeting<sup>5</sup>, to reconsider his original proposal<sup>6</sup>.

Where, at any time after giving a direction under head (2) above for the summoning of a meeting to consider a revised proposal, the court is satisfied that the debtor does not intend to submit such a proposal, the court must revoke the direction and revoke or suspend any approval given at the previous meeting<sup>7</sup>. Where the court gives such a direction, it may also give a direction continuing or, as the case may require, renewing, for such period as may be specified in the direction, the effect in relation to the debtor of any interim order<sup>8</sup>.

In any case where the court, on an application made with respect to a creditors' meeting, gives a direction under head (2) above or revokes or suspends an approval under the above provisions<sup>9</sup>, the court may give such supplemental directions as it thinks fit and, in particular, directions with respect to:

- 226 (a) things done since the meeting under any voluntary arrangement approved by the meeting; and
- 227 (b) such things done since the meeting as could not have been done if an interim order had been in force in relation to the debtor when they were done<sup>10</sup>.

Except in pursuance of the above provisions<sup>11</sup>, an approval given at a creditors' meeting<sup>12</sup> is not invalidated by any irregularity at or in relation to the meeting<sup>13</sup>.

1    Ie under the Insolvency Act 1986 s 262(1)-(3): see paras 118, 119 ante.

2    Ie the grounds mentioned in *ibid* s 262(1): see para 118 ante.

3    *Ibid* s 262(4)(a). As to the procedure where an order of revocation or suspension is made see para 121 post. Where the court has made an interim order under s 252 (see para 83 ante) in respect of an individual who subsequently dies, s 262 applies with the modification that it ceases to apply on or after the death of the individual: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch I Pt III para 4. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4    For the meaning of 'the debtor' see para 82 note 2 ante.

5    If it appears to the court that sufficient creditors (in value) would at any further meeting vote against the proposal, the court may decline to order a further meeting: *Re a Debtor (No 222 of 1990)*, *ex p Bank of Ireland* [1992] BCLC 137. When deciding whether to order a further meeting of creditors, the court ought to balance the heinousness of the irregularities that gave rise to the revocation against the interests of creditors: *IRC v Duce* [1999] BPIR 189. The test to be applied when considering the question whether to direct a further meeting to consider revised proposals is equivalent to that employed when considering whether to make an interim order, ie whether the proposal is serious and viable: *Re a Debtor (No 101 of 1999) (No 2)* [2001] BPIR 996.

- 6 Insolventcy Act 1986 s 262(4)(b).
- 7 Ibid s 262(5). See also note 3 *supra*.
- 8 Ibid s 262(6).
- 9 Ie under ibid s 262(4)(a) or (5): see *supra*.
- 10 Ibid s 262(7). As to the court's jurisdiction to award costs against a nominee/chairman as a result of breaches of duty on an application under s 262 see *Harmony Carpets v Chaffin-Laird* [2000] BCC 893, [2000] BPIR 61. See also *Re a Debtor (No 222 of 1990), ex p Bank of Ireland (No 2)* [1993] BCLC 233.
- 11 Ie the Insolventcy Act 1986 s 262(1)-(7): see *supra*; and paras 118, 119 *ante*.
- 12 Ie summoned under ibid s 257: see para 97 *ante*.
- 13 Ibid s 262(8).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolventcy Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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#### 121. Procedure following revocation or suspension.

Where the court makes an order of revocation or suspension of the voluntary arrangement<sup>1</sup>, the person who applied for the order must serve sealed copies of it:

- 228 (1) where the debtor is an undischarged bankrupt<sup>2</sup>, on the debtor<sup>3</sup>, the official receiver<sup>4</sup> and the trustee<sup>5</sup>;
- 229 (2) in any other case, on the debtor; and
- 230 (3) in either case, on the supervisor of the voluntary arrangement<sup>6</sup>.

If the order includes a direction by the court<sup>7</sup> for any further creditors' meeting to be summoned, notice must also be given<sup>8</sup>, by the person who applied for the order, to whoever is, in accordance with the direction, required to summon the meeting<sup>9</sup>. Where the debtor is an undischarged bankrupt, the trustee or, if there is no trustee, the official receiver, and in any other case, the debtor, must:

- 231 (a) forthwith after receiving a copy of the court's order, give notice of it to all persons who were sent notice of the creditors' meeting which approved the voluntary arrangement or who, not having been sent that notice, appear to be affected by that order;
- 232 (b) within seven days of their receiving a copy of the order, or within such longer period as the court may allow, give notice to the court whether it is intended to make a revised proposal to creditors, or to invite reconsideration of the original proposal<sup>10</sup>.

The person on whose application the order of revocation or suspension was made must, within seven days after the making of the order, give written notice of it to the Secretary of State, and must, in the case of an order of suspension, within seven days of the expiry of any suspension order, give written notice of such expiry to the Secretary of State<sup>11</sup>.

- 1 le under the Insolvency Act 1986 s 262: see paras 118-120 ante.
- 2 For the meaning of 'bankrupt' see para 84 note 4 ante. As to discharge from bankruptcy see para 629 et seq post.
- 3 For the meaning of 'the debtor' see para 82 note 2 ante.
- 4 As to the official receiver see para 31 et seq ante.
- 5 As to the trustee see para 316 et seq post.
- 6 Insolvency Rules 1986, SI 1986/1925, r 5.25(1), (2). As to the supervisor see para 108 et seq ante.
- 7 le under the Insolvency Act 1986 s 262(4)(b): see para 120 head (2) ante.
- 8 As to the mode of giving notice see para 797 post.
- 9 Insolvency Rules 1986, SI 1986/1925, r 5.25(3).
- 10 Ibid r 5.25(4) (amended by SI 1987/1919).
- 11 Insolvency Rules 1986, SI 1986/1925, r 5.25(5) (amended by SI 1999/359).

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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## (viii) Completion or Termination of the Arrangement

### 122. Completion or termination of the arrangement.

Not more than 28 days after the final completion or termination of the voluntary arrangement, the supervisor<sup>1</sup> must send to all creditors of the debtor<sup>2</sup> who are bound by the arrangement<sup>3</sup>, and to the debtor, a notice that the arrangement has been fully implemented or, as the case may be, terminated<sup>4</sup>. With the notice there must be sent to each of those persons a copy of a report by the supervisor summarising all receipts and payments made by him in pursuance of the arrangement, and explaining any difference in the actual implementation of it as compared with the proposal as approved by the creditors' meeting or, in the case of termination of the arrangement, explaining the reasons why the arrangement has not been implemented in accordance with the proposal as approved by the creditors' meeting<sup>5</sup>.



The supervisor must, within the 28 days mentioned above, send to the Secretary of State and to the court a copy of the notice to creditors, together with a copy of the report; and he must not vacate office until after such copies have been sent<sup>6</sup>.

On application by the supervisor, the court may extend the periods of 28 days referred to above<sup>7</sup>.

1 As to the supervisor see para 108 et seq ante.

2 For the meaning of 'the debtor' see para 82 note 2 ante.

3 As to the persons bound by the voluntary arrangement see para 107 head (2) ante.

4 Insolvency Rules 1986, SI 1986/1925, r 5.29(1) (amended by SI 1999/359). As from such day as the Secretary of State may by order made by statutory instrument appoint, there is to be inserted after the Insolvency Act 1986 s 262B (as prospectively added) (see para 117 ante) the following:

**'262C Arrangements coming to an end prematurely**

For the purposes of this Part, a voluntary arrangement approved by a creditors' meeting summoned under section 257 comes to an end prematurely if, when it ceases to have effect, it has not been fully implemented in respect of all persons bound by the arrangement by virtue of s 260(2)(b)(i)':

Insolvency 2000 ss 3, 16(1), (3), Sch 3 paras 1, 12. At the date at which this volume states the law no such day had been appointed.

5 Insolvency Rules 1986, SI 1986/1925, r 5.29(2) (amended by SI 1999/359).

6 Insolvency Rules 1986, SI 1986/1925, r 5.29(3) (amended by SI 1999/359).

7 Insolvency Rules 1986, SI 1986/1925, r 5.29(4). As to the mode of application and the procedure see para 764 et seq post.

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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## **(ix) Effect of Bankruptcy on the Arrangement**

### **123. Effect of bankruptcy on voluntary arrangement.**

Where a voluntary arrangement has been approved by the debtor's creditors<sup>1</sup> and a bankruptcy order is made against the debtor prior to final completion of the voluntary arrangement<sup>2</sup>, the order has the effect of bringing the voluntary arrangement to an end<sup>3</sup>. Where a voluntary arrangement provides for moneys or other assets to be paid or transferred or held for the benefit of creditors under a voluntary arrangement, a trust of those moneys or assets is created for those creditors. The effect of the bankruptcy of the debtor on a trust created by the voluntary arrangement depends on the provisions of the voluntary arrangement relating

thereto. If the voluntary arrangement does not so provide, the trust will continue notwithstanding the bankruptcy and must take effect according to its terms. The creditors under a voluntary arrangement may prove in the bankruptcy for so much of their debt as remains after payment of what has been or will be recovered under the trust<sup>4</sup>.

1 le pursuant to the Insolvency Act 1986 s 258: see para 98 et seq ante.

2 As to final completion of the arrangement see para 122 ante.

3 *Shierson v Tomlinson* [2002] EWCA Civ 404, Times, 11 April (a case concerning a company voluntary liquidation but the reasoning expressly extends to individual voluntary arrangements).

4 *Shierson v Tomlinson* [2002] EWCA Civ 404, Times, 11 April. For earlier cases on individual voluntary arrangements see also *Davis v Martin-Sklan* [1995] 2 BCLC 483, [1995] BCC 1122; *Re McKeen (a debtor)* [1995] BCC 412; *Re Bradley-Hole (a bankrupt)* [1995] 4 All ER 865, [1995] 1 WLR 1097.

## UPDATE

### 81-123 Individual Voluntary Arrangements

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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#### 123A. Fast-track voluntary arrangements.

Where an individual debtor intends to make a proposal to his creditors for a voluntary arrangement and the debtor is an undischarged bankrupt, the official receiver is specified in the proposal as the nominee in relation to the voluntary arrangement, and no interim order<sup>1</sup> is applied for<sup>2</sup>, the debtor may submit to the official receiver a document setting out the terms of the voluntary arrangement which the debtor is proposing<sup>3</sup>, and a statement of his affairs containing such particulars as may be prescribed of his creditors<sup>4</sup>, debts, other liabilities and assets and such other information as may be prescribed<sup>5</sup>.

If the official receiver thinks that the voluntary arrangement proposed has a reasonable prospect of being approved and implemented, he may make arrangements for inviting creditors to decide whether to approve it<sup>6</sup>. As soon as is reasonably practicable after the implementation of those arrangements, the official receiver must report to the court whether the proposed voluntary arrangement has been approved or rejected<sup>7</sup>. Where the official receiver reports to the court<sup>8</sup> that a proposed voluntary arrangement has been approved (1) the voluntary arrangement takes effect, binds the debtor, and binds every person who was entitled to participate in the arrangements<sup>9</sup>; (2) the court must annul the bankruptcy order in respect of the debtor on an application made by the official receiver<sup>10</sup>; and (3) the court may give such directions about the conduct of the bankruptcy and the administration of the bankrupt's estate as it thinks appropriate for facilitating the implementation of the approved voluntary arrangement<sup>11</sup>.

The court may make an order revoking a voluntary arrangement<sup>12</sup> on the ground that it unfairly prejudices the interests of a creditor of the debtor, or that a material irregularity occurred in

relation to the arrangements<sup>13</sup>. An order revoking a voluntary arrangement may be made only on the application of the debtor, a person who was entitled to participate in the arrangements, the trustee of the bankrupt's estate, or the official receiver<sup>14</sup>, and an application for such an order may not be made after the end of the period of 28 days beginning with the date on which the official receiver makes his report to the court<sup>15</sup>.

1     le an interim order applied for under the Insolvency Act 1986 s 253: see PARA 84.

2     Ibid s 263A (ss 263A-263G added by the Enterprise Act 2002 Sch 22 para 2). The Secretary of State may by order amend the 1986 Act so as to extend the provisions of ss 263B to 263G to some or all cases other than those specified in s 263A: 2002 Act s 264(2). An order under s 264(2) must be made by statutory instrument, and may not be made unless a draft has been laid before and approved by each House of Parliament: s 264(3). An order under s 264(2) may make consequential provision, which may include provision amending the 1986 Act or another enactment, and transitional provision: 2002 Act s 264(4).

3     1986 Act s 263B(1)(a).

4     A person is a 'creditor' only if he is a creditor of the debtor in respect of a bankruptcy debt, and the official receiver is aware of his claim and his address: *ibid* s 263B(3).

5     Ibid s 263B(1)(b). Where a debtor submits documents to the official receiver under s 263B(1), no application for an interim order may be made in respect of the debtor until the official receiver has (1) made arrangements as described in s 263B(2) (see TEXT AND NOTE 6); or (2) informed the debtor that he does not intend to make arrangements, whether because he does not think the voluntary arrangement has a reasonable prospect of being approved and implemented or because he declines to act: s 263B(5). As to the contents of the prescribed particulars, and the requirement for the official receiver to notify the debtor whether he will act as nominee, see the Insolvency Rules 1986, SI 1986/1925, rr 5.37, 5.38 (added by SI 2003/1730).

6     1986 Act s 263B(2). Arrangements made under s 263B(2) (1) must include the provision to each creditor of a copy of the proposed voluntary arrangement; (2) must include the provision to each creditor of information about the criteria by reference to which the official receiver will determine whether the creditors approve or reject the proposed voluntary arrangement; and (3) may not include an opportunity for modifications to the proposed voluntary arrangement to be suggested or made: s 263B(4). For further provisions concerning arrangements for approval of, and approval of, a fast-track voluntary arrangement, see the Insolvency Rules 1986, SI 1986/1925, rr 5.39-5.45 (added by SI 2003/1730).

7     1986 Act s 263C.

8     le under *ibid* s 263C: see TEXT AND NOTE 7.

9     Ibid s 263D(1), (2). le the arrangements made under s 263B(2) (see TEXT AND NOTE 6). Section 263 (see PARA 108 et seq) applies to a voluntary arrangement which has effect by virtue of s 263D(2) as it applies to a voluntary arrangement approved by a creditors' meeting: s 263E. Section 262B has effect in relation to a voluntary arrangement which has effect by virtue of s 263D(2) (for which purposes the words 'by a creditors' meeting summoned under s 257' are to be disregarded): s 263G(2).

10    Ibid s 263D(1), (3). Such an application may not be made (1) during the period specified in s 263F(3) during which the voluntary arrangement can be challenged by application under s 263F(2); (2) while an application under s 263F is pending; or (3) while an appeal in respect of an application under s 263F is pending or may be brought: s 263D(4). As to s 263F see TEXT AND NOTES 13-15. For further provisions in relation to applications by the official receiver to annul a bankruptcy order under s 263D(3), see the Insolvency Rules 1986, SI 1986/1925, Pt 5 Chs 10, 11 (rr 5.57-5.61) (added by SI 2003/1730).

11    1986 Act s 263D(1), (5). Section 262A (see PARA 82) has effect in relation to obtaining approval to a proposal for a voluntary arrangement under s 263D: s 263G(1). The Deeds of Arrangement Act 1914 does not apply to the voluntary arrangement: 1986 Act s 263D(6). A reference in the 1986 Act or another enactment to a voluntary arrangement approved under Pt VIII includes a reference to a voluntary arrangement which has effect by virtue of s 263D: s 263D(7). For further provisions concerning fast-track voluntary arrangements, see the Insolvency Rules 1986, SI 1986/1925, Pt 5 Ch 7 (rr 5.35-5.50) (added by SI 2003/1730).

12    le a voluntary arrangement which has effect by virtue of the 1986 Act s 263D(2) (see TEXT AND NOTE 9).

13    Ibid s 263F(1). le arrangements made under s 263B(2) (see TEXT AND NOTE 6). See also the Insolvency Rules 1986, SI 1986/1925, r 5.46 (added by SI 2003/1730).

14    1986 Act s 263F(2).

15 Ibid s 263F(3). Ie the official receiver's report to the court made under s 263C (see TEXT AND NOTE 8). A creditor who was not made aware of the arrangements under s 263B(2) (see TEXT AND NOTE 6) at the time when they were made may make an application under s 263F(2) during the period of 28 days beginning with the date on which he becomes aware of the voluntary arrangement: s 263F(4).

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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#### **123B. Debt relief orders.**

An individual who is unable to pay his debts may apply for a debt relief order to be made in respect of his qualifying debts: Insolvency Act 1986 s 251A(1) (Pt 7A (ss 251A-251X) added by the Tribunals, Courts and Enforcement Act 2007 Sch 17). A 'qualifying debt' means a debt which is for a liquidated sum payable either immediately or at some certain future time, and is not an excluded debt: see the Insolvency Act 1986 s 251A(2), (4); Insolvency Rules 1986, SI 1986/1925, r 5A.2 (r 5A added by SI 2009/642, amended by SI 2010/686). However, a debt is not a qualifying debt to the extent that it is secured: Insolvency Act 1986 s 251A(3). An application for a debt relief order must be made to the official receiver through an approved intermediary, and may be sent by electronic form and by electronic means: s 215B(1); Insolvency Rules 1986, SI 1986/1925, r 5A.4. As to approved intermediaries, see the Insolvency Act 1986 s 251U. As to regulations made under s 251U, see the Debt Relief Orders (Designation of Competent Authorities) Regulations 2009, SI 2009/457 (amended by SI 2009/1307). The application for a debt relief order must include a list of the debtor's debts and creditors, details of any security held in respect of those debts, and other prescribed information about the debtor's affairs: s 215B(2); Insolvency Rules 1986, SI 1986/1925, rr 5A.3, 5A.5. In the Insolvency Act 1986 Pt 7, 'debtor' means, in relation to an application for a debt relief order, the applicant and, in relation to a debt relief order, the person in relation to whom the order is made: s 251X(1).

The official receiver must determine an application for a debt relief order and must give reasons if he refuses the application: see s 251C(1)-(3), (7); Insolvency Rules 1986, SI 1986/1925, r 5A.6. The official receiver may refuse the application if he considers that it does not meet all the requirements imposed by or under the Insolvency Act 1986 s 251B, any queries raised with the debtor have not been satisfactorily answered, the debtor has made any false representation or omission, or if he is not satisfied the conditions specified in Sch 4ZA paras 9, 10 are met: see s 251C(4), (6), Sch 4ZA (added by the Tribunals, Courts and Enforcement Act 2007 Sch 18); Insolvency Rules 1986, SI 1986/1925, rr 5A.7-5A.10. The official receiver must refuse the application if he is not satisfied that the debtor is unable to pay his debts, that at least one of the debts specified in the application was a qualifying debt, and that each the conditions specified in the Insolvency Act 1986 Sch 4ZA paras 1-8 are met: s 251C(5).

Certain presumptions apply to the determination of an application for a debt relief order: see s 251D. The court may make a debt relief restrictions order in relation to a person in respect of

whom a debt relief order has been made, and such a person or an applicant for a debt relief order may make a debt relief restrictions undertaking to the Secretary of State: see Sch 4ZB (added by the Tribunals, Courts and Enforcement Act 2007 Sch 19). Where a court is considering whether a debt relief restrictions order should be made in relation to a debtor under the Insolvency Act 1986 Sch 4ZB, it must take into account any conduct of the debtor before 6 April 2009: Tribunals, Courts and Enforcement Act 2007 (Transitional Provision) Order 2009, SI 2009/450, reg 2. The Secretary of State must maintain a register of matters relating to debt relief orders, debt relief restrictions orders and debt relief restrictions undertakings: Insolvency Act 1986 s 251W.

As to the prescribed form of debt relief orders, see s 251E, and the Insolvency Rules 1986, SI 1986/1925, rr 5A.11-5A.13. Any administration orders under the County Courts Act 1984 Pt 6, enforcement restriction orders under Pt 6A, and debt repayment plans arranged in accordance with a debt management scheme approved under the Tribunals, Courts and Enforcement Act 2007 Pt 5 Ch 4 in respect of the debtor cease to be in force when a debt relief order is made: Insolvency Act 1986 s 251F. Subject to the right of a secured creditor to enforce his security, a moratorium has effect on the effective date for a debt relief order in relation to each qualifying debt specified in the order: see s 251G. Unless it terminates early or is extended by the official receiver, the moratorium lasts for one year: s 251H and the Insolvency Rules 1986, SI 1986/1925, rr 5A.20, 5A.27. Subject to certain exceptions, the debtor is discharged from the qualifying debts specified in the debt relief order at the end of the moratorium: Insolvency Act 1986 s 251I.

The debtor is required to give relevant information and provide assistance to the official receiver in relation to his application for a debt relief order, or such an order made as a result of his application: see s 251J; the Insolvency Rules 1986, SI 1986/1925, r 5A.17. Creditors may object to the making of a debt relief order, their inclusion in the order or the details of the debt specified in it and, if such an objection is made, the official receiver must consider it: see the Insolvency Act 1986 s 251K; the Insolvency Rules 1986, SI 1986/1925, rr 5A.14, 5A.15. In specified circumstances, the official receiver may revoke or amend a debt relief order during the applicable moratorium period: see the Insolvency Act 1986 s 251L; the Insolvency Rules 1986, SI 1986/1925, r 5A.16. Any person who is dissatisfied by any act, omission or decision of the official receiver in connection with a debt relief order or an application for an order may make an application to the court, and the official receiver may seek directions or an order from the court in connection with a debt relief order or an application for an order: Insolvency Act 1986 s 251M and the Insolvency Rules 1986, SI 1986/1925, rr 5A.19, 5A.21. On the application of the official receiver, the court may summon the debtor, his spouse, former spouse, civil partner or former civil partner or any person appearing to the court to be able to give information or assistance concerning the debtor or his dealings, affairs and property to appear before the court: Insolvency Act 1986 s 251N and the Insolvency Rules 1986, SI 1986/1925, r 5A.21.

A person who applies for a debt relief order who knowingly or recklessly makes a false representation or omission to the official receiver in support of his application is guilty of an offence: Insolvency Act 1986 s 251O. It is also an offence for a person in respect of whom a debt relief order is made to (1) conceal or falsify relevant documents during the moratorium period (s 251P); (2) fraudulently dispose of property (s 251Q); (3) fraudulently deal with property obtained on credit (s 251R); (4) obtain credit without giving specified information about his status as a person subject to debt relief order to the creditor, or engage in business under a different name without disclosing the name in which the order was made (s 251S). For the purposes of s 251S(4), the maximum amount of credit which a person, in respect of whom a debt relief order is made, may obtain without disclosure of his status is £500: SI 1986/1996 Schedule Pt II (amended by SI 2009/465). Proceedings for an offence under any of the Insolvency Act 1986 ss 251O-251S may only be instituted by the Secretary of State or by or with the consent of the Director of Public Prosecutions: s 251T(1). It is not a defence in proceedings for an offence under any of ss 251O-251S that anything relied on as constituting

the offence was done outside England and Wales: s 251T(2). A person guilty of an offence under any of ss 251O-251S is liable to imprisonment or a fine, or both: s 251T(3). As to the maximum terms of punishment and levels of fines, see Sch 10 (amended by the Tribunals, Courts and Enforcement Act 2007 Sch 20 para 15).

## **UPDATE**

### **81-123 Individual Voluntary Arrangements**

An individual who is unable to pay his debts may apply for a debt relief order, as an alternative to individual voluntary arrangements or bankruptcy: see the Insolvency Act 1986 Pt 7A (ss 251A-251X), Schs 4ZA, 4ZB; and PARA

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## **(6) BANKRUPTCY PETITIONS**

### **(i) In general**

#### **124. Who may present a bankruptcy petition.**

A petition<sup>1</sup> for a bankruptcy order to be made against an individual may be presented to the court in accordance with the provisions of the Insolvency Act 1986<sup>2</sup>:

- 233 (1) by one of the individual's creditors or jointly by more than one of them<sup>3</sup>;
- 234 (2) by the individual himself<sup>4</sup>;
- 235 (3) by the supervisor<sup>5</sup> of, or any person, other than the individual, who is for the time being bound<sup>6</sup> by, a voluntary arrangement proposed by the individual and approved under Part VIII of the 1986 Act<sup>7</sup>;
- 236 (4) where a criminal bankruptcy order has been made against the individual<sup>8</sup>, by the Official Petitioner<sup>9</sup> or by any person specified in the order<sup>10</sup> in pursuance of the Powers of Criminal Courts Act 1973<sup>11</sup>.

If it appears to the court appropriate to do so on the grounds that there has been a contravention of the Insolvency Rules 1986<sup>12</sup> or for any other reason, the court has a general power to dismiss a bankruptcy petition or to stay proceedings on such a petition; and, where it stays proceedings on a petition, it may do so on such terms and conditions as it thinks fit<sup>13</sup>.

Subject to the above provisions, the court may make a bankruptcy order on any such petition<sup>14</sup>; and a bankruptcy petition may not be withdrawn without the permission of the court<sup>15</sup>.

1 For these purposes, 'bankruptcy petition' means a petition to the court for a bankruptcy order: Insolvency Act 1986 s 381(3). For the meaning of 'bankruptcy order' see para 84 note 4 ante. As to the application of s 381 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 84 note 4 ante. In bankruptcy, references in the Insolvency Rules 1986, SI 1986/1925 (as amended) to 'the petitioner' or 'the petitioning creditor' include any person who has been substituted as such, or been given carriage of the petition: rr 13.1, 13.10.

2 In accordance with the provisions of the Insolvency Act 1986 Pt IX (ss 264-371) (as amended). As to the amount of deposit as security for fees payable on presentation of a petition under s 264(1) see para 164 post.

3 As to creditors' petitions see para 160 et seq post.

4 As to debtors' petitions see para 188 et seq post.

5 As to the supervisor of a voluntary arrangement see para 108 et seq ante.

6 As to the persons bound by a voluntary arrangement see para 107 head (2) ante.

7 le a voluntary arrangement approved under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.

8 As to criminal bankruptcy orders see para 844 et seq post.

9 As to the Official Petitioner see para 845 post.

10 le specified pursuant to the Powers of Criminal Courts Act 1973 s 39(3)(b) (repealed): see para 848 head (2) post. As to the repeal of s 39 see para 844 note 1 post.

11 Insolvency Act 1986 s 264(1). As to the prospective repeal of s 264(1)(d) (see text head (4) supra) see para 844 note 2 post. Where a bankruptcy petition relating to an individual is presented by a person who is entitled to present a petition under two or more of s 264(1)(a)-(d) (see text heads (1)-(4) supra), the petition is to be treated for the purposes of Pt IX (ss 264-371) (as amended) as a petition under such one of s 264(1)(a)-(d) as may be specified in the petition: s 266(1).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, an insolvency administration petition must, unless the court otherwise directs, be served on the personal representative and must be served on such other persons as the court may direct: s 266(1) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 2(a)). As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

As to the modification of the Insolvency Act 1986 ss 264, 266 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820-822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1227, 1262, 1267, 1269.

12 le the Insolvency Rules 1986, SI 1986/1925 (as amended).

13 Insolvency Act 1986 s 266(3). Pursuant to s 266(3), the court may dismiss a petition on the grounds of want of prosecution: *TSB Bank plc v Platts* [1997] BPIR 151. As to the exercise of the court's powers under the Insolvency Act 1986 s 266(3) in the context of a claim that a petition was presented for the ulterior purpose of preventing a debtor from proceeding with an action brought by him see *Re Ross (a bankrupt) (No 2)* [2000] BPIR 636, CA.

Pursuant to the Insolvency Act 1986 s 266(3), the court may also dismiss the petition on the grounds that there is a prior foreign bankruptcy in respect of the debtor or on the ground that the debtor has no assets in the jurisdiction: *Re Thulin* [1995] 1 WLR 165. See also *Re McCulloch, ex p McCulloch* (1880) 14 ChD 716, CA; *Re Robinson, ex p Robinson* (1883) 22 ChD 816, CA; *Re Artola Hermanos, ex p André Châle* (1890) 24 QBD 640, CA; *Re A Debtor (No 199 of 1922)* [1922] 2 Ch 470, CA.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, in the Insolvency Act 1986 s 266(3) for the words 'bankruptcy petition' there are to be substituted the words 'petition to the court for an insolvency administration order with or without costs': Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 2(b).

Without prejudice to the Insolvency Act 1986 s 266(3), where a petition under s 264(1)(a), (b) or (c) (see text heads (1)-(3) supra) in respect of an individual is pending at a time when a criminal bankruptcy order is made against him, or is presented after such an order has been so made, the court may, on the application of the Official Petitioner, dismiss the petition if it appears to it appropriate to do so: Insolvency Act 1986 s 266(4). As to the prospective repeal of s 266(4) see para 844 note 2 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, a petition for an insolvency administration order to be made may be presented to the court in accordance with Pt IX (ss 264-371) (as amended): (1) by one of the individual's creditors or jointly by more than one of them in the prescribed form; (2) by the supervisor of, or any person, other than the individual, who is for the time being bound by, a voluntary arrangement proposed by the individual and approved under Pt VIII (ss 252-263) in the prescribed form; or (3) where a criminal bankruptcy order has been made against the individual, by the Official Petitioner or by any person specified in the order in pursuance of the Powers of Criminal Courts Act 1973 s 39(3)(b) (repealed) in the prescribed form in any case

where a creditor could present such a petition under head (1) supra: Insolvency Act 1986 s 264(1) (amended by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 1(a)-(e)). The prescribed forms are: (a) in a case falling within head (1) supra, the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 1; (b) in a case falling within head (2) supra, Sch 3, Form 2; and (c) in a case falling within head (3) supra, Sch 3, Form 3: Sch 1 Pt II para 1(b), (d), (e).

14 Insolvency Act 1986 s 264(2). As to the procedure on presenting bankruptcy petitions see para 160 et seq post; and as to bankruptcy orders see para 195 et seq post. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the court may make an insolvency administration order on any such petition as is mentioned in s 264(1) (as amended) (see note 13 supra) in the prescribed form: s 264(2) (amended by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 1(f)). For the prescribed form of insolvency administration order see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 4.

15 See the Insolvency Act 1986 s 266(2); and para 184 post. In circumstances where the petition debt has been paid, secured or compounded for and there are supporting creditors, the court may order any such creditor to be substituted for the petitioner or on the hearing of the petition may make an order changing the carriage of the petition: see the Insolvency Rules 1986, SI 1986/1925, rr 6.30, 6.31; and paras 182, 183 post.

## **UPDATE**

### **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **124 Who may present a bankruptcy petition**

TEXT AND NOTES 1-11--Also, heads (5) by a temporary administrator; (6) by a liquidator: 1986 Act s 264(1) (amended by SI 2002/1240). For the meanings of 'temporary administrator' and 'liquidator' see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 450.

NOTE 11--Now in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, an insolvency administration petition must, if a liquidator has been appointed in proceedings by virtue of EC Council Regulation 1346/2000 on insolvency proceedings art 3(1) in relation to the deceased debtor, be served on him, unless the court directs otherwise, be served on the personal representative, and be served on such other persons as the court may direct: 1986 Act s 266(1) (substituted by SI 2002/1309).

NOTE 13--Also, heads (4) by a temporary administrator in the prescribed form; (5) by a liquidator in the prescribed form: 1986 Act s 264(1) (amended by SI 2002/1309). Also, head (d) in a case falling within head (4) or (5), SI 1986/1999 Sch 3 Form 1: Sch 1 Pt II para 1(ca), (cb) (added by SI 2002/1309).

SI 1986/1999 Sch 3 substituted: SI 2002/1309.

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#### **125. Conditions to be satisfied in respect of debtor.**



A bankruptcy petition may not be presented to the court by one of the individual's creditors or jointly by more than one of them<sup>1</sup> or by the individual himself<sup>2</sup> unless the debtor:

- 237 (1) is domiciled<sup>3</sup> in England and Wales; or
  - 238 (2) is personally present in England and Wales on the day on which the petition is presented; or
  - 239 (3) at any time in the period of three years ending with that day:
- 17
- 22. (a) has been ordinarily resident<sup>4</sup> or has had a place of residence, in England and Wales; or
  - 23. (b) has carried on business<sup>5</sup> in England and Wales<sup>6</sup>.
- 18

1 He under the Insolvency Act 1986 s 264(1)(a): see para 124 head (1) ante.

2 He under ibid s 264(1)(b): see para 124 head (2) ante.

3 A person is domiciled in the country in which at the time of his birth the person on whom he was legally dependent was domiciled or in the country in which he has acquired a domicile by choice: see CONFLICT OF LAWS vol 8(3) (Reissue) para 38 et seq. The onus of proving the debtor's domicile is on the petitioning creditor, but prima facie evidence may be adduced so as to throw the burden on the debtor: *Re Mitchell, ex p Cunningham* (1884) 13 QBD 418, 53 LJ Ch 1067, CA. There is a presumption of continuing domicile so that, if the petitioning creditor establishes the debtor's domicile of origin, the onus is on the debtor to prove any change of domicile by choice: *Winans v A-G* [1904] AC 287, HL; *Re Lloyd Evans, National Provincial Bank v Evans* [1947] Ch 695. See also *Re Bird, ex p Debtor v IRC* [1962] 2 All ER 406, [1962] 1 WLR 686, CA.

4 For the meaning of 'ordinary residence' see CONFLICT OF LAWS vol 8(3) (Reissue) para 58. A person resides where in common parlance he lives, and a temporary absence is immaterial, provided that there is an intention to return and a house or lodging to which to return: see *R v St Leonard's Shoreditch (Inhabitants)* (1865) LR 1 QB 21; *R v Glossop Union* (1866) LR 1 QB 227. The word 'reside' implies a degree of permanence (*Levene v IRC* [1928] AC 217 at 222, 223, HL; *Fox v Stirk* [1970] 2 QB 463 at 477, [1970] 3 All ER 7 at 13, CA; *Brokelmann v Barr* [1971] 2 QB 602, [1971] 3 All ER 29), but a person may be resident in more than one place at the same time (*Levene v IRC* supra; *Langford Property Co Ltd v Tureman* [1949] 1 KB 29, sub nom *Langford Property Co Ltd v Athanassoglou* [1948] 2 All ER 722, CA; *Herbert v Byrne* [1964] 1 All ER 882, [1964] 1 WLR 519, CA; and contrast *Beck v Scholz* [1953] 1 QB 570, [1953] 1 All ER 814, CA).

5 For these purposes, the reference to an individual carrying on business includes: (1) the carrying on of business by a firm or partnership of which the individual is a member; and (2) the carrying on of business by an agent or manager for the individual or for such a firm or partnership: Insolvency Act 1986 s 265(2). For the meaning of 'business' see para 81 note 4 ante. See also COMPETITION vol 18 (2009) PARA 370.

Under the equivalent provision in the Bankruptcy Act 1914 (repealed) it was held that the words 'carry on business' denoted something of a permanent character, not merely an isolated transaction and that a business was carried on only where there was some degree of management or control: see *Brown v London and North Western Ry Co* (1863) 32 LJQB 318; *Graham v Lewis* (1888) 22 QBD 1, CA; *Cain v Butler* [1916] 1 KB 759 at 762; but contrast *Cornelius v Phillips* [1918] AC 199. See also *Kirkwood v Gadd* [1910] AC 422 at 423, HL; *Newman v Oughton* [1911] 1 KB 792; *Transport and General Credit Corp Ltd v Morgan* [1939] Ch 531, [1939] 2 All ER 17; *Re Brauch (a debtor), ex p Britannic Securities and Investments Ltd* [1978] Ch 316, [1978] 1 All ER 1004, CA; *Re Sarflax Ltd* [1979] Ch 592, [1979] 1 All ER 529.

Under the Bankruptcy Act 1914 (repealed) it was held that a business continued to be carried on until the trader had performed all the obligations that the fact of trading imposed on him: *Theophile v Solicitor-General* [1950] AC 186, [1950] 1 All ER 405, HL. Accordingly, under the 1914 Act (repealed) a debtor continued to carry on business until he had paid all his trade debts and satisfied all his tax and customs liabilities, notwithstanding the fact that he might have disposed of or otherwise ceased his business: *Theophile v Solicitor-General* supra; *Re Bird, ex p Debtor v IRC* [1962] 2 All ER 406, [1962] 1 WLR 686, CA.

The cases decided under the Bankruptcy Act 1914 (repealed) in these respects apply to the equivalent provisions in the Insolvency Act 1986: *Re A Debtor (No 784 of 1991)* [1992] Ch 554, sub nom *Re A Debtor (No 784 of 1991), ex p Debtor v IRC* [1992] 3 All ER 376.

The fact that there are unappealed tax assessments against a debtor based on his having carried on a business in England and Wales in the previous three years does not estop the debtor from challenging an assertion in a bankruptcy petition that he has carried on business in England and Wales in the previous three years: *Wilkinson v IRC* [1998] BPIR 418.

6 Insolvency Act 1986 s 265(1). As to the modification of s 265 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820-822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1221, 1261, 1268.

## UPDATE

### 124-159 Bankruptcy petitions

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 125 Conditions to be satisfied in respect of debtor

NOTE 3--A debtor's knowledge that the bankruptcy laws of another jurisdiction are more favourable to him cannot prevent him from acquiring domicile there: *Henwood v Barlow Clowes International Ltd (in liquidation)* [2007] EWHC 1579 (Ch), [2007] BPIR 1329 (rvsd on a different point [2008] EWCA Civ 577, [2008] BPIR 778, [2008] All ER (D) 330 (May)).

NOTE 6--1986 Act s 265 is subject to EC Council Regulation 1346/2000 on insolvency proceedings art 3: 1986 Act s 265(3) (added by SI 2002/1240).

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## (ii) Creditor's Petition

### A. IN GENERAL

#### 126. Grounds of creditor's petition.

A creditor's petition<sup>1</sup> must be in respect of one or more debts<sup>2</sup> owed by the debtor; and the petitioning creditor<sup>3</sup> or each of the petitioning creditors must be a person to whom the debt or, as the case may be, at least one of the debts, is owed<sup>4</sup>.

A creditor's petition may, however, be presented to the court in respect of a debt only if, at the time the petition is presented:

- 240 (1) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level<sup>5</sup>;
- 241 (2) the debt, or each of the debts, is for a liquidated sum<sup>6</sup> payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured<sup>7</sup>;
- 242 (3) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay<sup>8</sup>; and
- 243 (4) there is no outstanding application<sup>9</sup> to set aside a statutory demand served<sup>10</sup> in respect of the debt or any of the debts<sup>11</sup>.

1 In the Insolvency Act 1986 'creditor's petition' means a bankruptcy petition under s 264(1)(a) (see para 124 head (1) ante): s 385(1). As to the application of s 385 in the case of the administration in bankruptcy of

the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 6 note 8 ante.

2 As to identification of debts see the Insolvency Rules 1986, SI 1986/1925, r 6.8 (as amended); and para 162 post.

3 As to the substitution of a petitioning creditor see *ibid* r 6.30; and para 182 post.

4 Insolvency Act 1986 s 267(1). For guidance on completing the forms of petition under s 267 see *Practice Direction-Insolvency Proceedings* para 15; and para 161 note 7 post. Where a petition is presented in respect of a debt which is not properly owed by the debtor to the petitioner or is disputed by the debtor, it may be an abuse of process: see paras 158, 185 post. A petition may be presented in respect of a debt which is not provable in the bankruptcy, although the court will exercise its discretion to make a bankruptcy order on such a petition only in special circumstances: *Levy v Legal Services Commission* [2001] 1 All ER 895, [2001] 1 FCR 178, CA; cf *Russell v Russell* [1999] 2 FCR 137, [1998] BPIR 259.

A single petition may be presented in respect of two or more debts owed by the debtor to separate creditors: *Re Allen, Re A Debtor (No 367 of 1992)* [1998] BPIR 319.

As to the modification of the Insolvency Act s 267(1) by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 820 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1225.

5 For these purposes, 'the bankruptcy level' is £750; but the Secretary of State may, by order in a statutory instrument, substitute any amount specified in the order for that amount or, as the case may be, for the amount which, by virtue of such an order, is for the time being the amount of the bankruptcy level: Insolvency Act 1986 s 267(4). An order may not, however, be made under s 267(4) unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament: s 267(5). At the date at which this volume states the law no such order had been made.

6 As to liquidated sums see para 130 post. A debt is not to be regarded, for these purposes, as a debt for a liquidated sum by reason only that the amount of the debt is specified in a criminal bankruptcy order: *ibid* s 267(3). As to criminal bankruptcy orders see para 844 et seq post; and as to the prospective repeal of s 267(3) see para 844 note 2 post.

7 As to secured creditors see paras 152, 560 et seq post. A debt which is the debt, or one of the debts, in respect of which a creditor's petition is presented need not be unsecured if either: (1) the petition contains a statement by the person having the right to enforce the security that he is willing, in the event of the bankruptcy order being made, to give up his security for the benefit of all the bankrupt's creditors; or (2) the petition is expressed not to be made in respect of the secured part of the debt and contains a statement by that person of the estimated value at the date of the petition of the security for the secured part of the debt: *ibid* s 269(1). In a case falling within s 269(1)(b) (see head (2) *supra*), the secured and unsecured parts of the debt are to be treated for the purposes of ss 267-270 as separate debts: s 269(2).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 269 applies with the modification that for the words 'ss 267-270' there are to be substituted the words 'ss 267, 269': Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 4. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

In the case of the bankruptcy of an individual member of an insolvent partnership, the Insolvency Act 1986 s 269 does not in certain circumstances apply: see the Insolvent Partnerships Order 1994, SI 1994/2421, art 8(6), (7)(a); para 820 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1218.

8 As to inability to pay see para 127 post.

9 *Ie* under the Insolvency Rules 1986, SI 1986/1925, r 6.4: see para 157 post. For these purposes, the application must be one which has been made within time and it is irrelevant that a grant of an extension of time may have been given: *Chohan v Times Newspapers Ltd* [2001] EWCA Civ 964, [2001] 1 WLR 1859. A letter written to court to request the setting aside of the statutory demand does not constitute an application to set aside the statutory demand for these purposes: *Ariyo v Sovereign Leasing plc* [1998] BPIR 177, CA.

10 *Ie* under the Insolvency Act 1986 s 268: see para 127 post.

11 *Ibid* s 267(2). A petition may be presented, notwithstanding that an application to set aside the statutory demand on which the petition is based is pending, where there are grounds for believing that the assets of the debtor are in jeopardy: *Re A Debtor (No 22 of 1993)* [1994] 2 All ER 105, [1994] 1 WLR 46.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, a creditor's petition may, subject to the Insolvency Act 1986 s 267(3)-(5),

be presented to the court in respect of a debt or debts only if, had the debtor been alive at the time the petition is presented: (1) the amount of the debt, or the aggregate amount of the debts, owed by the debtor would have been equal to or exceeded the bankruptcy level; or (2) the debt, or each of the debts, owed by the debtor would have been for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain future time, and would have been unsecured: s 267(2) (amended by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 3).

As to the modification of the Insolvency Act 1986 s 267(2) by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 820 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1225.

## **UPDATE**

### **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **126 Grounds of creditor's petition**

NOTE 4--A claim for solicitors' fees not as yet judicially assessed or determined is not a claim for a liquidated sum which could be the subject of a bankruptcy petition under the 1986 Act s 267: *Truex v Toll* [2009] EWHC 396 (Ch), [2009] 4 All ER 419.

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### **127. Inability to pay debts.**

For the above purposes<sup>1</sup>, the debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either:

- 244 (1) the petitioning creditor to whom the debt is owed has served on the debtor a demand ('the statutory demand')<sup>2</sup> in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least three weeks have elapsed since the demand was served and the demand has been neither complied with nor set aside; or
- 245 (2) execution or other process issued in respect of the debt on a judgment<sup>3</sup> or order of any court in favour of the petitioning creditor, or one or more of the petitioning creditors to whom the debt is owed, has been returned<sup>4</sup> unsatisfied in whole or in part<sup>5</sup>.

For the above purposes<sup>6</sup>, the debtor appears to have no reasonable prospect of being able to pay a debt if, but only if, the debt is not immediately payable; and:

- 246 (a) the petitioning creditor to whom it is owed has served on the debtor a demand (also known as 'the statutory demand')<sup>7</sup> in the prescribed form requiring him to establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due;
- 247 (b) at least three weeks have elapsed since the demand was served; and
- 248 (c) the demand has been neither complied with nor set aside<sup>8</sup>.

1 le for the purposes of the Insolvency Act 1986 s 267(2)(c): see para 126 head (3) ante.

2 As to statutory demands see para 154 et seq post.

3 A costs order made in favour of a party to proceedings creates a judgment debt in favour of the payee party, notwithstanding that the payee was in receipt of legal aid: *Re A Debtor (No 68/SD/97)* [1998] 4 All ER 779.

4 In order for a creditor to prove that execution has been returned unsatisfied he must show there has been a serious attempt to levy execution; a mere visit by the sheriff to the execution debtor's premises, and a report of his inability to gain access to them, is not sufficient: *Re A Debtor (No 340 of 1992), ex p Debtor v First National Commercial Bank plc* [1996] 2 All ER 211, CA. There must be proof that the execution or other process has failed to satisfy the debt but the fact that the sheriff fails to indorse a statement on the writ will not be fatal to its validity as proof of an unsatisfied return: *Skarzynski v Chalford Property Co Ltd* [2001] BPIR 673.

5 Insolvency Act 1986 s 268(1). As to expedited petitions see para 128 post.

As to the modification of s 268 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 820 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1226.

6 See note 1 supra.

7 See note 2 supra.

8 Insolvency Act 1986 s 268(2). As to the shortening of the three-week period see para 128 post.

## UPDATE

### 124-159 Bankruptcy petitions

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 128. Expedited petitions.

In the case of a creditor's petition presented wholly or partly in respect of a debt which is the subject of a statutory demand<sup>1</sup>, the petition may be presented before the end of the three-week period from the service of the demand<sup>2</sup> if there is a serious possibility that the debtor's property or the value of any of his property will be significantly diminished during that period and the petition contains a statement to that effect<sup>3</sup>. However, in such a case the court may not make a bankruptcy order until at least three weeks have elapsed since the service of any statutory demand<sup>4</sup>.

1 le under the Insolvency Act 1986 s 268: see para 127 ante. As to statutory demands see para 154 et seq post.

2 le the period mentioned in *ibid* s 268: see para 127 ante.

3 *Ibid* s 270. In the case of the bankruptcy of an individual member of an insolvent partnership (see para 817 et seq post), s 270 does not in certain circumstances apply: see the Insolvent Partnerships Order 1994, SI

1994/2421, art 8(6), (7)(a); para 820 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1218.

4 See the Insolvency Act 1986 s 271; and para 195 post.

## UPDATE

### 124-159 Bankruptcy petitions

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## **B. THE CREDITOR'S DEBT**

### **129. In general.**

A creditor's petition may be presented to the court in respect of a debt or debts only if (inter alia) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured<sup>1</sup>. Where the petitioning creditor serves a statutory demand, the demand must specify whether it is made in respect of a debt payable immediately or a debt not so payable<sup>2</sup>. If the amount claimed includes any charge by way of interest not previously notified to the debtor as a liability of his, or any other charge accruing from time to time, the amount or rate of the charge must be separately identified, and the grounds on which payment of it is claimed must be stated; and, in either case, the amount claimed must be limited to that which has accrued due at the date of the demand<sup>3</sup>. The amount of the debt, or the aggregate amount of the debts, must be equal to or exceed the bankruptcy level<sup>4</sup>. Statutory interest on a judgment debt becomes part of that debt<sup>5</sup> and may be relied on to make up the debt to the prescribed amount<sup>6</sup>.

1 See para 126 ante.

2 See para 154 post.

3 See para 154 post.

4 See para 126 ante. The costs of an abortive execution cannot be added to a judgment debt for the purposes of making up the unsatisfied debt to the bankruptcy level; they do not form part of the judgment debt, or a debt in any sense, and may be recovered only out of the particular fund formed by the fruits of the particular execution, the debtor having no personal liability for them: *Re Long & Co, ex p Cuddeford* (1888) 20 QBD 316, CA. Similarly, the costs incurred in presenting a petition cannot be added to another debt for the purpose of making the debt up to the bankruptcy level: *Lilley v American Express Europe Ltd* [2000] BPIR 70.

5 *Re Clagett, ex p Lewis* (1887) 36 WR 653, CA.

6 Cf *Re Lehmann, ex p Hasluck* (1890) 7 Morr 181.

## UPDATE

### 124-159 Bankruptcy petitions

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/B. THE CREDITOR'S DEBT/130. Liquidated sum.

### 130. Liquidated sum.

A covenant to pay the excess of debts due from a firm over debts due to it is not a covenant to pay a liquidated sum<sup>1</sup>. A claim arising from a failure to redeliver shares lent by one person to another has been held not to be a 'debt or sum of money due or claimed to be due'<sup>2</sup>; nor is there a debt due in respect of a liability under a bond of indemnity as to costs<sup>3</sup>. The amount of differences fixed under its rules by the default official, due to a stock exchange creditor by a defaulter, is a liquidated sum and, therefore, a good petitioning creditor's debt<sup>4</sup>.

If the borrower under an equitable mortgage agrees to repay the principal on a stated day with interest at a fixed rate, and to execute a legal mortgage on the same terms as to interest, and, if the principal is not repaid on the stated day, there is a contract to pay interest at the rate fixed after that day, and, if the interest is not paid, there is a liquidated sum due<sup>5</sup>.

A right to damages is not a right to a liquidated sum and cannot be made the basis for a petition until the damages have been liquidated<sup>6</sup>. Notwithstanding that a judgment is prima facie for a liquidated sum, the court may go behind the judgment to ascertain whether it is in fact liquidated<sup>7</sup>. Costs awarded to a litigant are not liquidated until assessed; and unassessed costs cannot in themselves constitute a debt on which a bankruptcy petition may be presented<sup>8</sup>.

The amount owing under an unassessed bill in respect of professional services can constitute a liquidated sum<sup>9</sup>. A sum assessed by the Commissioners of the Inland Revenue as owing in respect of unpaid tax can also constitute a liquidated sum in respect of which a petition may be presented<sup>10</sup>.

1 *Re Broadhurst, ex p Broadhurst* (1852) 22 LJ Bcy 21, CA; *Walker v Broadhurst* (1853) 8 Exch 889.

2 *Owen v Routh* (1854) 14 CB 327 (decided under the Judgments Act 1838); cf *Utterson v Vernon* (1792) 4 Term Rep 570 (reconsidering the earlier determination of that case at (1790) 3 Term Rep 539).

3 *Johnson v Diamond* (1855) 11 Exch 73.

4 *Re Ward, ex p Ward* (1882) 22 ChD 132, CA. See also *Re Mendelssohn, ex p Mendelssohn* [1903] 1 KB 216, CA; on appeal sub nom *Mendelssohn v Ratcliff* [1904] AC 456, HL.

5 *Re King, ex p Furber* (1881) 17 ChD 191.

6 *Re Miller* [1901] 1 KB 51, CA. An award of damages by the verdict of a jury, without judgment or without an order giving effect to the verdict, has been held not to be a liquidation of the damages: *Re Muirhead, ex p Muirhead* (1876) 2 ChD 22 at 25, CA, distinguished in *Re A Debtor (No 975 of 1937)* [1938] 2 All ER 530, CA (final order to pay damages). Similarly, a right in equity to an account is not a right to a liquidated sum and cannot constitute the basis for a petition: *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695; and see para 135 note 1 post. See also *Bennett v Filmer* [1998] BPIR 444.

7 *Re A Debtor, ex p Berkshire Finance Co Ltd v Debtor* (1962) 106 Sol Jo 468, DC (judgment for liquidated sum under a hire-purchase agreement, although the creditor had no more than a cause of action for unliquidated damages).

8 *Re A Debtor (No 20 of 1953), ex p Debtor v Scott* [1954] 3 All ER 74, [1954] 1 WLR 1190, CA. An order for an interim payment (see CPR r 25.6; and CIVIL PROCEDURE vol 11 (2009) PARA 324) is a liquidated sum in respect of which a bankruptcy petition may be presented: *Maxwell v Bishopsgate Investment Management Ltd (in liquidation)* (1993) Times, 11 February.

9 *Re A Debtor (No 88 of 1991)* [1993] Ch 286, [1992] 4 All ER 301.

10 *Re A Debtor (No 960/SD/1992), ex p Debtor v IRC* [1993] STC 218n. The same applies in respect of amounts assessed as owing in respect of value added tax by the Commissioners of Customs and Excise: *Cozens v Customs and Excise Comrs* [2000] BPIR 252, CA.

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#### 131. Debt must be recoverable by legal process.

Subject to the case of debts payable at some certain, future time, the debt must be one which is recoverable by legal process. Thus, a bankruptcy petition may not be presented in respect of a debt<sup>1</sup> which is barred by the Limitation Act 1980<sup>2</sup>.

1 As to such debts see LIMITATION PERIODS.

2 *Re Tynte, ex p Tynte* (1880) 15 ChD 125. A bankruptcy petition may not be presented in respect of a judgment debt after the expiration of six years from the date on which the judgment became enforceable: see the Limitation Act 1980 s 24; LIMITATION PERIODS vol 68 (2008) PARA 953; *Re A Debtor (50A-SD-1995)* [1997] Ch 310, [1997] 2 All ER 789; *Bruton v IRC* [2000] BPIR 946.

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### 124-159 Bankruptcy petitions

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#### 132. Sureties.



A surety cannot present a bankruptcy petition against his co-surety unless he has paid more than his proportion of the sum guaranteed<sup>1</sup>.

<sup>1</sup> *Re Snowden, ex p Snowden* (1881) 17 ChD 44, CA; *Wolmershausen v Gullick* [1893] 2 Ch 514 (where it was held that the liability of a bankrupt co-surety to contribution unascertained at the time of the bankruptcy was not a debt available for a petition); but see *Re Macdonald, ex p Grant* [1888] WN 130, CA (where it was held that a surety for a debt payable by instalments may, when one instalment has matured of which he has paid more than his share, petition against his co-surety); cf *Re A Debtor (No 66 of 1955), ex p Debtor v Trustee of Property of Waite (a bankrupt)* [1956] 3 All ER 225, [1956] 1 WLR 1226, CA.

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### 124-159 Bankruptcy petitions

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### 133. Loans to pay gambling debts.

A loan made to enable the debtor to pay a bet which he has lost is not a transaction in respect of a gaming contract within the meaning of the Gaming Act 1892<sup>1</sup>, provided that the debtor remains legally entitled to deal with the loan as he likes, and a surety who has paid the loan may present a bankruptcy petition against the debtor<sup>2</sup>. The position is otherwise if the loan is made subject to an express stipulation that it is to be applied in payment of outstanding bets<sup>3</sup>.

<sup>1</sup> See the Gaming Act 1892 s 1; and LICENSING AND GAMBLING vol 67 (2008) PARA 327.

<sup>2</sup> *Re O'Shea, ex p Lancaster* [1911] 2 KB 981, CA; cf *Re A Debtor (No 4 of 1922), ex p Petitioning Creditor* [1922] B & CR 116, CA.

<sup>3</sup> *MacDonald v Green* [1951] 1 KB 594, [1950] 2 All ER 1240, CA.

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### 124-159 Bankruptcy petitions

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### 134. Merger of debts.

Under the Bankruptcy Act 1914, if a simple contract debt at the date of the act of bankruptcy became afterwards merged in a judgment or a security of a higher nature, the merger did not extinguish the debt for the purposes of bankruptcy proceedings, and the debt was still available as a petitioning creditor's debt<sup>1</sup>. It is apprehended that the same principle applies under the Insolvency Act 1986 where a contract debt at the date of the statutory demand<sup>2</sup> becomes merged in a judgment or security<sup>3</sup> before presentation of the bankruptcy petition.

1 *Re King and Beesley, ex p King and Beesley* [1895] 1 QB 189, DC.

2 As to statutory demands see para 154 et seq post.

3 As to secured creditors see para 152 post.

## UPDATE

### 124-159 Bankruptcy petitions

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### 135. Equitable debt.

A petition may be founded on a High Court judgment for the payment of a liquidated sum in respect of an equitable liability<sup>1</sup>, or on a debt to which a creditor is entitled in equity but not at law<sup>2</sup>.

1 See CPR Sch 1, RSC Ord 45 r 1; *Re Faithfull, ex p Moore* (1885) 14 QBD 627, CA; and CIVIL PROCEDURE. However, a right to damages arising out of an equitable liability or a right to an account in equity is not a right to a liquidated sum and, therefore, is not a debt in respect of which a creditor may present a bankruptcy petition: *Re Jones, ex p Jones* (1881) 18 ChD 109, CA (cited in *Re A Debtor (No 564 of 1949), ex p Customs and Excise Comrs v Debtor* [1950] Ch 282, [1950] 1 All ER 308, CA); *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695.

2 As to the concurrent administration of law and equity see the Supreme Court Act 1981 s 49; and EQUITY vol 16(2) (Reissue) paras 499-500. The Bankruptcy Act 1869 s 6 (repealed) defined a debt as a liquidated sum due at law or in equity; but that definition does not appear in the Insolvency Act 1986. Judgments and orders are each enforced in the same manner: see CPR Sch 1, RSC Ord 45; and CIVIL PROCEDURE.

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### 124-159 Bankruptcy petitions

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### 135 Equitable debt

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### C. CREDITORS WHO MAY PETITION

#### 136. Which creditors may petition.

Any person who has a right to claim immediate payment of a sum of money due to him and is capable of giving a valid release to the debtor, or who will at a certain time in the future have such a right and be in a position to give a valid release, may in general present a bankruptcy petition against the debtor, subject to the statutory conditions being fulfilled<sup>1</sup>. It is possible, therefore, for a creditor to petition in bankruptcy, even though he has no immediate right of payment<sup>2</sup>.

In the case of debts due to the Crown or to a department of State, the petition is in general presented in the name of the government department concerned, but it may be presented by the Attorney General<sup>3</sup>.

The sole creditor of a debtor may present a bankruptcy petition against the debtor<sup>4</sup>; and it appears that a creditor has a right to petition, however wealthy the debtor may appear to be and whatever prospect there may be of obtaining payment by other means, provided that a statutory demand has been served and not set aside<sup>5</sup>.

1 As to the statutory conditions see paras 125-127 ante.

2 See the Insolvency Act 1986 s 267(2)(b); and para 126 head (2) ante.

3 See the Crown Proceedings Act 1947; and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) para 119. As to the court in which the petition must be presented see the Insolvency Rules 1986, SI 1986/1925, r 6.9(1)(a); and para 160 head (1) post.

4 'If the debtor has only one creditor, this is a point to be considered by the registrar on hearing the petition, but it cannot be laid down as a matter of principle that, if there is only one creditor, the registrar ought to dismiss the petition. The trustee in a bankruptcy may be able to set aside transactions and get in assets which could not be set aside or got in without an adjudication of bankruptcy. The mere fact that a man has only one creditor is not a sufficient ground for saying that bankruptcy proceedings cannot be maintained against him': *Re Hecquard, ex p Hecquard* (1889) 24 QBD 71 at 76, CA per Lindley LJ. See also *Re Painter, ex p Painter* [1895] 1 QB 85.

5 *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114. As to statutory demands see para 154 et seq post.

### UPDATE

#### 124-159 Bankruptcy petitions

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### **137. Companies.**

A company may be a petitioning creditor<sup>1</sup>. It may act by any of its officers duly authorised under its seal<sup>2</sup>, and may give a general authority to an officer to present bankruptcy petitions<sup>3</sup> in the future in respect of debts which may not have arisen at the date when the authority is given<sup>4</sup>. It is sufficient if the company's seal is affixed to the copy which constitutes the officer's authority<sup>5</sup>, the sufficiency of which may be inquired into by the court, although the debtor has not taken objection to it<sup>6</sup>. Any person chosen bona fide by the company as its agent to present a bankruptcy petition becomes thereby an officer of the company for the purpose<sup>7</sup>. The petition must be in the company's name; if the company is in liquidation, the petition must be in the name of the company, and not of the liquidator<sup>8</sup>.

<sup>1</sup> *Re Collier, ex p Dan Rylands Ltd* (1891) 8 Morr 80; *Re Whitley, ex p Mirfield Commercial Co Ltd* (1891) 65 LT 351; *Re Sanders, ex p Sanders* (1894) 1 Mans 382.

<sup>2</sup> Is subject to the company's articles of association: see COMPANIES vol 14 (2009) PARA 227 et seq. However, a company need not have a common seal; and a document signed by a director and the secretary of a company, or by two directors of a company, and expressed, in whatever form of words, to be executed by the company has the same effect as if executed under the common seal of the company: see the Companies Act 1985 s 36A(2), (3) (added by the Companies Act 1989 s 130(2)); and COMPANIES vol 14 (2009) PARA 288.

<sup>3</sup> An authority to an officer to sue on behalf of a company does not entitle him to present a bankruptcy petition: *Guthrie v Fisk* (1824) 3 B & C 178.

<sup>4</sup> *Re A Debtor (No 28 of 1917), ex p Petitioning Creditors v Debtor* [1917] 2 KB 808, DC; cf *Re A Debtor, ex p Debtor (No 30 of 1914)* [1915] 1 KB 287 (where the authority given was held to be limited to acts of bankruptcy available at its date).

<sup>5</sup> *Re Midgley* (1913) 108 LT 45.

<sup>6</sup> *Re Sanders, ex p Sanders* (1894) 1 Mans 382.

<sup>7</sup> *Re Tomkins & Co* [1901] 1 KB 476 (although the person nominated was only a clerk, the petition was held good).

<sup>8</sup> *Re Winterbottom, ex p Winterbottom* (1886) 18 QBD 446; *Re Shirley, ex p Mackay* (1887) 58 LT 237; *Re Bassett, ex p Lewis* (1895) 2 Mans 177; *Re A Debtor (No 41 of 1950), ex p Debtor v Hunter (Liquidator of Marvel Paper Products Ltd)* [1952] Ch 192, [1952] 1 All ER 107, DC. The form of petition should be 'The AB Company Limited, In Liquidation, by CD its Liquidator'.

## **UPDATE**

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## 137 Companies

NOTE 2--1985 Act s 36A replaced with amendments: Companies Act 2006 s 44.

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### 138. Partners.

A petition by a partnership firm may be presented in the firm name, provided that the partnership is carrying on business within the jurisdiction<sup>1</sup>; and a firm consisting of two or more persons may present a petition, even though one of them is under a disability<sup>2</sup>.

The fact that a partner has retired since judgment in the firm name was recovered against the debtor does not make it necessary that the court's permission should be obtained for a petition to be presented in the firm name<sup>3</sup>. If one of two partners who have filed a petition against a debtor becomes bankrupt before the petition is heard, the trustee of the bankrupt partner should be made a co-petitioner<sup>4</sup>.

One partner may present a petition against a co-partner in respect of a distinct debt for which an action might have been brought notwithstanding the partnership, but not in a case where it would depend on taking partnership accounts whether the sum was due or not<sup>5</sup>. If a partner brings an action for an account and treats a debt due to him by his co-partner as mixed with the partnership accounts, he cannot afterwards present a petition in respect of that debt<sup>6</sup>.

One of two joint obligees under a bond is not by himself a good petitioning creditor<sup>7</sup>; but, where one of several joint creditors has died, a petition may be presented by the survivors<sup>8</sup>.

1 See CPR Sch 1, RSC Ord 81 r 1; and CIVIL PROCEDURE.

2 *Harris v Beauchamp Bros* [1893] 2 QB 534.

3 *Re Hill, ex p Holt & Co* [1921] 2 KB 831.

4 *Re Owen, ex p Owen* (1884) 13 QBD 113, CA.

5 *Re Notley, ex p Notley* (1833) 1 Mont & A 46; *Windham v Paterson* (1815) 1 Stark 144; *Re Palmer, ex p Richardson & Son* (1833) 3 Deac & Ch 244.

6 *Re Gray, ex p Gray* (1835) 2 Mont & A 283.

7 *Brickland v Newsome* (1808) 1 Camp 474.

8 *Re Tucker, ex p Tucker* (1895) 2 Mans 358, CA.

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### 138 Partners

NOTE 1--CPR Sch 1 RSC Ord 81 revoked: SI 2006/1689.

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### **139. Executors.**

One of several executors may present a petition in respect of a debt due to the executors<sup>1</sup>. An executor may present a petition against a debtor to the deceased before taking out a grant of probate<sup>2</sup>; but it is doubtful whether an executor may secure a bankruptcy order before probate has been obtained<sup>3</sup>. Where a petitioning creditor dies before a bankruptcy order is made, his executor may apply to carry on the proceedings<sup>4</sup>.

1 *Treasure v Jones* (1785) cited 1 Selwyn's Nisi Prius (12th Edn) 253; *Ex p Brown* (1832) 1 Deac & Ch 118.

2 *Re Drakeley, ex p Paddy* (1818) 3 Madd 241; *Rogers v James* (1816) 7 Taunt 147.

3 See the cases cited in note 2 supra; and *Re Masonic and General Life Assurance Co* (1885) 32 ChD 373. The court might stay proceedings until production of probate: *Tarn v Commercial Banking Co of Sydney* (1884) 12 QBD 294.

4 See CPR Sch 1, RSC Ord 15 r 7; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) paras 226, 820.

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### **140. Receivers.**

A receiver of an estate cannot as such present a bankruptcy petition in respect of a debt due to the estate which has not been assigned to him, even if the debtor has been ordered to pay the receiver; but, if the receiver is in a position to sue in his own name, he may present a petition<sup>1</sup>. If a receiver is the holder of a bill of exchange<sup>2</sup> or the assignee of a judgment debt<sup>3</sup>, he may present a petition based on the debt.

Special rules apply to the enforcement of the payment of sums awarded in matrimonial causes in favour of the petitioner<sup>4</sup> or of the Queen's Proctor intervening<sup>5</sup>.

1 *Re Sacker, ex p Sacker* (1888) 22 QBD 179, CA; *Re Macoun* [1904] 2 KB 700, CA.

2 *Re Lewis, ex p Harris* (1876) 2 ChD 423.

3 *Re Macoun* [1904] 2 KB 700, CA.

4 Where the co-respondent has been ordered to pay to the petitioner's solicitors the costs of the suit on their undertaking to lodge in court any sums recovered under the order, the solicitors cannot, it seems, present a bankruptcy petition in respect of those costs: *Re A Debtor (No 76 of 1929)* [1929] 2 Ch 146, CA.

5 The Queen's Proctor who has intervened in a divorce suit, and to whom a party has been ordered to pay costs, is not in the position of a receiver, and may present a bankruptcy petition against the party; and the Queen's Proctor for the time being may present the petition, although he did not hold the office when the costs payable by the party were incurred: *Re Rayner, ex p Rayner* (1877) 37 LT 38.

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### 141. Trustees.

Where there are more trustees than one, as a general rule, they must all join as petitioning creditors. A person to whom a debt is due as a bare trustee may present a petition in certain cases, for example, when the beneficial owner of the debt is under disability<sup>1</sup>; but, when a debt is due to a person as a bare trustee for an absolute beneficial owner who is capable of dealing with the debt as he pleases, the trustee alone cannot present a petition on the debt, and the beneficial owner must join as co-petitioner<sup>2</sup>. If a person to whom a debt is due as trustee is also beneficially entitled to part of the debt, he may present a petition on the debt without joining the beneficiary<sup>3</sup>.

A trustee in bankruptcy may present a petition in respect of a debt due to the bankrupt<sup>4</sup>.

1 *Re Adams, ex p Culley* (1878) 9 ChD 307 at 311, CA per Cotton LJ.

2 *Re Adams, ex p Culley* (1878) 9 ChD 307, CA; *Re Hastings, ex p Dearle* (1884) 14 QBD 184, CA. Permission may be given to amend a petition presented by a bare trustee by joining the beneficiary: *Re Hastings, ex p Dearle* supra; *Re Ellis, ex p Hinshelwood* (1887) 4 Morr 283, CA. As to the time within which the petition must be amended see para 169 post.

3 *Re Gamgee, ex p Gamgee* (1891) 8 Morr 182, CA.

4 *Re Blakey, ex p Blakey* (1822) 1 Gl & J 197; *Re Bagley* [1911] 1 KB 317, CA; and see the Insolvency Act 1986 s 314(1)(a), Sch 5 Pt I para 2; and para 460 head (2) post.

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### **142. Assignees of debts.**

The legal<sup>1</sup> or equitable assignee of a debt may present a bankruptcy petition without joining the assignor<sup>2</sup>; but a judgment creditor who has obtained a garnishee order against a person indebted to the judgment debtor cannot present a bankruptcy petition against that person<sup>3</sup>.

1 See the Law of Property Act 1925 s 136(1); and CHOSER IN ACTION vol 13 (2009) PARA 72 et seq. Part of a debt cannot be legally assigned so as to enable the assignee to levy execution in respect of it: *Forster v Baker* [1910] 2 KB 636, CA; *Re Steel Wing Co Ltd* [1921] 1 Ch 349. It follows, therefore, that the assignee of part of a debt cannot issue a statutory demand or present a petition in respect of the debt.

2 A judgment debt arising out of an equitable liability is a legally enforceable debt, but the equitable liability itself is not a debt on which a bankruptcy petition may be founded: see *Re Jones, ex p Jones* (1881) 18 ChD 109, CA (cited in *Re A Debtor (No 564 of 1949), ex p Customs and Excise Comrs v Debtor* [1950] Ch 282, [1950] 1 All ER 308, CA); *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695. A debt does not, however, cease to be a debt because the title to it is equitable, as where a legal debt is assigned in equity, and the assignee may present a petition in bankruptcy against the debtor without joining the assignor as co-petitioner: see *Re Baillie, ex p Cooper* (1875) LR 20 Eq 762; and CHOSER IN ACTION.

3 *Re Combined Weighing and Advertising Machine Co* (1889) 43 ChD 99, CA.

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### **143. Factors.**

A factor who sells goods in his own name, even though not on a del credere commission, may present a bankruptcy petition against the purchaser of the goods unless the principal has agreed with the factor to treat the purchaser as his own debtor, and has taken steps to recover the debt directly from the purchaser<sup>1</sup>.

1 *Sadler v Leigh* (1815) 4 Camp 195.

## **UPDATE**



## **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/C. CREDITORS WHO MAY PETITION/144. Minors.

### **144. Minors.**

A creditor who is a minor may present a bankruptcy petition by his litigation friend<sup>1</sup>.

<sup>1</sup> See CPR r 21.2(2); CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 10; CIVIL PROCEDURE vol 11 (2009) PARA 222; *Re Brocklebank, ex p Brocklebank* (1877) 6 ChD 358, CA (where an adjudication made on a petition presented by a minor by his next friend, based on non-compliance with a debtor's summons issued by the minor in person, was held valid).

## **UPDATE**

## **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/C. CREDITORS WHO MAY PETITION/145. Mentally disordered persons.

### **145. Mentally disordered persons.**

A mentally disordered person may present a bankruptcy petition by his litigation friend<sup>1</sup>.

<sup>1</sup> See CPR r 21.2(1); and CIVIL PROCEDURE vol 11 (2009) PARA 222.

## **UPDATE**

## **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/C. CREDITORS WHO MAY PETITION/146. Married persons.

#### **146. Married persons.**

A married woman is in exactly the same position as regards the presentation of a bankruptcy petition as a man or a single woman<sup>1</sup>. If a husband owes debts in respect of credit provided by his wife or vice versa, either may present a bankruptcy petition against the other<sup>2</sup>.

<sup>1</sup> See the Law Reform (Married Women and Tortfeasors) Act 1935 s 1(c); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 204, 210. Cf para 9 ante.

<sup>2</sup> As to the ranking in priority of such debts see the Insolvency Act 1986 s 329; and para 586 post.

#### **UPDATE**

##### **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/C. CREDITORS WHO MAY PETITION/147. Bankrupts.

#### **147. Bankrupts.**

An undischarged bankrupt may present a bankruptcy petition in respect of debts due to him which have not vested in his trustee, such as damages due to him in respect of his pain and suffering<sup>1</sup>. However, all causes of action relating to the recovery of the property of the bankrupt vest in the trustee in bankruptcy on the making of the bankruptcy order<sup>2</sup>.

<sup>1</sup> *Ord v Upton* [2001] Ch 352, sub nom *Ord v Upton (as trustee to the property of Ord)* [2000] 1 All ER 193, CA.

<sup>2</sup> See the Insolvency Act 1986 s 306(1); para 391 post; *Ord v Upton* [2001] Ch 352, sub nom *Ord v Upton (as trustee to the property of Ord)* [2000] 1 All ER 193, CA (where a cause of action consists partly of a personal claim for damages in respect of pain and suffering and partly of a claim for the recovery of property, it will vest in the trustee in bankruptcy and any damages received in respect of the personal claim will be held on trust for the bankrupt). As to the vesting of property in the trustee generally see para 390 et seq post.

#### **UPDATE**

##### **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/C. CREDITORS WHO MAY PETITION/148. Moneylenders.

#### **148. Moneylenders.**

A creditor may present a petition in respect of a moneylending transaction made before 27 January 1980 if, at the time of the transaction, he was a licensed moneylender<sup>1</sup>.

<sup>1</sup> See the Insolvency Rules 1986, SI 1986/1925, r 6.20; and para 175 post. The petition must be supported by an affidavit incorporating a statement setting out in detail the particulars mentioned in the Moneylenders Act 1927 s 9(2) (repealed): see the Insolvency Rules 1986, SI 1986/1925, r 6.20. As to the use of witness statements instead of affidavits in insolvency proceedings see r 7.57(5), (6) (as substituted); and para 793 post.

#### **UPDATE**

##### **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/C. CREDITORS WHO MAY PETITION/149. Landlord exercising concurrent remedies.

#### **149. Landlord exercising concurrent remedies.**

A landlord who presents a bankruptcy petition against his tenant founded on an unsatisfied execution issued in respect of a judgment debt, and subsequently gives notice<sup>1</sup> to the tenant's subtenants requiring them to pay their rent direct to him as superior landlord, is not thereby prevented from continuing the bankruptcy proceedings and obtaining a bankruptcy order, provided that a debt equal to or exceeding the bankruptcy level<sup>2</sup> still remains after the receipt of any rent from the subtenants<sup>3</sup>.

<sup>1</sup> ie under the Law of Distress Amendment Act 1908 s 6: see DISTRESS vol 13 (2007 Reissue) para 960.

<sup>2</sup> For the meaning of 'the bankruptcy level' see para 126 note 5 ante.

<sup>3</sup> *Re A Debtor (No 549 of 1928)* [1929] 1 Ch 170, CA (decided under the Bankruptcy Act 1914 (repealed); landlord's petition founded on non-compliance with a bankruptcy notice based on the judgment; landlord able to continue proceedings to the making of a receiving order).

#### **UPDATE**

##### **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/C. CREDITORS WHO MAY PETITION/150. Foreigners.

### **150. Foreigners.**

Provided that he is not an enemy alien<sup>1</sup>, there is nothing to prevent a foreigner from presenting a bankruptcy petition if a debt is owing to him for which he could maintain an action<sup>2</sup>, although he may be required to give security for costs<sup>3</sup>.

1 As to the test of whether a person or a corporate body is an enemy alien see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) para 574. See further para 526 post.

2 *Re Myer, ex p Pascal* (1876) 1 ChD 509, CA.

3 See CPR r 25.12; and CIVIL PROCEDURE vol 11 (2009) PARA 745. See also the Insolvency Rules 1986, SI 1986/1925, r 6.17; and para 168 post.

### **UPDATE**

#### **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/C. CREDITORS WHO MAY PETITION/151. Stock Exchange.

### **151. Stock Exchange.**

The proceedings in the liquidation of the contracts of a defaulting member by the default official<sup>1</sup> are not an accord and satisfaction of the member's debts and do not bar his creditors from suing him for the balance of their claims<sup>2</sup>; and any such creditor who has obtained judgment in such an action may maintain a petition in bankruptcy against the defaulter<sup>3</sup>.

1 As to the default official see the Stock Exchange Rules (1994) r 15.2.

2 *Mendelssohn v Ratcliff* [1904] AC 456, HL.

3 *Re Ward, ex p Ward* (1882) 22 ChD 132, CA; *Mendelssohn v Ratcliff* [1904] AC 456, HL.

### **UPDATE**

#### **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **151 Stock Exchange**

NOTE 1--Stock Exchange Rules (1994) r 15.2 now 2002 Rules r D050.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/C. CREDITORS WHO MAY PETITION/152. Secured creditors.

## **152. Secured creditors.**

A creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented, the debt, or each of the debts, is or are unsecured<sup>1</sup>. However, a debt which is the debt, or one of the debts, in respect of which a creditor's petition is presented need not be unsecured if either:

- 249 (1) the petition contains a statement by the person having the right to enforce the security that he is willing, in the event of a bankruptcy order being made, to give up his security for the benefit of all the bankrupt's creditors; or
- 250 (2) the petition is expressed not to be made in respect of the secured part of the debt and contains a statement by that person of the estimated value at the date of the petition of the security for the secured part of the debt<sup>2</sup>.

1 See the Insolvency Act 1986 s 267(2)(b); and para 126 head (2) ante. A debt is 'secured' for the purposes of Pts VIII-XI (ss 252-385) (as amended) to the extent that the person to whom the debt is owed holds security over any property of the person by whom it is owed: *Re A Debtor (No 310 of 1988)*, *ex p Debtor v Arab Bank Ltd* [1989] 2 All ER 42, sub nom *Re A Debtor (No 310 of 1988)* [1989] 1 WLR 452.

2 See the Insolvency Act 1986 s 269(1); and para 126 ante. In a case falling within s 269(1)(b) (see text head (2) supra), the secured and unsecured parts of the debt are to be treated for the purposes of ss 267-270 as separate debts: s 269(2).

A statement made under s 269(1)(a) (see text head (1) supra) in circumstances where the creditor could not realise the security because of a challenge made by the debtor's wife will not be regarded as improper, even if the debtor has no other creditors: *Zandfarid v Bank of Credit and Commerce International SA (in liquidation)* [1996] 1 WLR 1420, [1996] BPIR 501.

## **UPDATE**

### **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY

PETITIONS/(ii) Creditor's Petition/D. CREDITORS WHO MAY NOT PETITION/153. Creditors who may not petition.

## **D. CREDITORS WHO MAY NOT PETITION**

### **153. Creditors who may not petition.**

No bankruptcy petition relating to the debtor may be presented or proceeded with during the period for which an interim order is in force<sup>1</sup>. Where proceedings on a bankruptcy petition have been stayed by an interim order which ceases to have effect<sup>2</sup>, that petition is deemed to have been dismissed unless the court otherwise orders<sup>3</sup>. Where the debtor is an undischarged bankrupt and the creditors' meeting approves the proposed voluntary arrangement, with or without modifications<sup>4</sup>, the court may annul the bankruptcy order by which he was adjudged bankrupt<sup>5</sup>.

A bankruptcy petition may be dismissed by the court where its presentation amounts to an abuse of the process of the court<sup>6</sup>.

1 See the Insolvency Act 1986 s 252(2)(a); and para 83 head (1) ante.

2 See under *ibid* s 260(4); see para 107 ante.

3 See *ibid* s 260(5); and para 107 ante.

4 See para 100 ante.

5 See the Insolvency Act 1986 s 261(1)(a); and para 107 head (a) ante.

6 See para 185 post. 'Abuse of process' includes circumstances where, by presenting a petition or continuing bankruptcy proceedings or by threatening to do so, the creditor is attempting to obtain or has obtained an advantage to which he is not properly entitled: *Re Majory, A Debtor, ex p Debtor v FA Dumont Ltd* [1955] Ch 600, sub nom *Re A Debtor (No 757 of 1954), ex p Debtor v FA Dumont Ltd (Petitioning Creditor)* [1955] 2 All ER 65, CA. Such conduct on the part of the creditor is sometimes called 'extortion'. This includes circumstances where a petition is presented by a creditor in respect of a debt to which he is not properly entitled. Presentation of a petition may also amount to an abuse of process where the petition debt is genuinely disputed by the debtor.

It is the court's duty to dismiss a petition which is made a means of extorting or attempting to extort money: *Re Atkinson, ex p Atkinson* (1892) 9 Morr 193, CA; *Re Otway, ex p Otway* [1895] 1 QB 812, CA; *Re Bebro* [1900] 2 QB 316, CA. Under the Insolvency Act 1986 the court may grant an application to set aside a statutory demand founded on a debt which is disputed by the debtor on grounds which appear to the court to be substantial: see the Insolvency Rules 1986, SI 1986/1925, r 6.5(4)(b); and para 158 head (b) post.

## **UPDATE**

### **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/E. THE STATUTORY DEMAND/154. Form and content.

## **E. THE STATUTORY DEMAND**

### 154. Form and content.

A statutory demand<sup>1</sup> must be dated, and must be signed either by the creditor himself or by a person stating himself to be authorised to make the demand on the creditor's behalf<sup>2</sup>; and the demand must specify whether it is in respect of a debt<sup>3</sup> payable immediately or a debt<sup>4</sup> not so payable<sup>5</sup>. It must state the amount of the debt, and the consideration for it, or, if there is no consideration, the way in which it arises, and:

- 251 (1) if it relates to a debt payable immediately<sup>6</sup>, and founded on a judgment or order of a court, it must give details of the judgment or order; and
- 252 (2) if it relates to a debt not so payable<sup>7</sup>, it must state the grounds on which it is alleged that the debtor appears to have no reasonable prospect of paying the debt<sup>8</sup>.

If the amount claimed in the demand includes:

- 253 (a) any charge by way of interest not previously notified to the debtor as a liability of his; or
- 254 (b) any other charge accruing from time to time,

the amount or rate of the charge must be separately identified, and the grounds on which payment of it is claimed must be stated<sup>9</sup>. In either case, the amount claimed must be limited to that which has accrued due at the date of the demand<sup>9</sup>.

If the creditor holds any security<sup>10</sup> in respect of the debt, the full amount of the debt must be specified, but:

- 255 (i) there must in the demand be specified the nature of the security, and the value which the creditor puts on it as at the date of the demand; and
- 256 (ii) the amount of which payment is claimed by the demand must be the full amount of the debt, less the amount specified as the value of the security<sup>11</sup>.

1    le under the Insolvency Act 1986 s 268: see para 127 ante. For the prescribed forms of statutory demand see the Insolvency Rules 1986, SI 1986/1925, rr 6.1, 12.7(1), (2), Sch 4, Form 6.1 (debt for liquidated sum payable immediately), Form 6.2 (debt for liquidated sum payable immediately following a judgment or order of the court), Form 6.3 (debt payable at future date) (all substituted by SI 1987/1919). A document purporting to be a statutory demand which is served on a debtor is a statutory demand within the meaning of the Insolvency Rules 1986, SI 1986/1925 (as amended) even if it is defective and liable to be set aside; it remains a statutory demand unless and until it is set aside by the court: *Re A Debtor (No 1 of 1987, Lancaster)*, ex p *Debtor v Royal Bank of Scotland plc* [1989] 2 All ER 46, sub nom *Re A Debtor (No 1 of 1987)* [1989] 1 WLR 271, CA.

2    Insolvency Rules 1986, SI 1986/1925, r 6.1(1). Rule 6.1 does not displace the general principle that a person may sign by the hand of another whom he has authorised to do so: *Re Horne (a bankrupt)* [2000] 4 All ER 550, sub nom *Horne v Dacorum Borough Council* [2000] BPIR 1047, CA.

3    le whether it is made under the Insolvency Act 1986 s 268(1): see para 127 ante.

4    le whether it is made under ibid s 268(2): see para 127 ante.

5    Insolvency Rules 1986, SI 1986/1925, r 6.1(2).

6    See note 3 supra.

7    See note 4 supra.

8    Insolvency Rules 1986, SI 1986/1925, r 6.1(3).

9 Ibid r 6.1(4).

10 For the meaning of 'security' see para 560 post. As to secured creditors see para 560 et seq post. For these purposes, 'security' refers only to security over property forming part of the debtor's estate: *Re A Debtor (No 310 of 1988)*, ex p *Debtor v Arab Bank Ltd* [1989] 2 All ER 42, sub nom *Re A Debtor (No 310 of 1988)* [1989] 1 WLR 452.

11 Insolvency Rules 1986, SI 1986/1925, r 6.1(5). Disagreement as to the value of a security does not prevent a sum claimed in a statutory demand from being a liquidated sum, provided that the dispute does not bring into question whether the debtor is indebted to the creditor at all: *Re A Debtor (No 64 of 1992)* [1994] 2 All ER 177, [1994] 1 WLR 264.

## UPDATE

### 124-159 Bankruptcy petitions

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 154 Form and content

TEXT AND NOTES--SI 1986/1925 r 6.1 does not apply to a demand made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 372(4)(a) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 501): Bankruptcy (Financial Services and Markets Act 2000) Rules 2001, SI 2001/3634, r 4(1). A demand must be dated and signed by a member of the Authority's staff authorised by it for that purpose, and must specify that it is made under the 2000 Act s 372(4)(a): SI 2001/3634 r 4(2), (3). It must state the amount of the debt, to whom it is owed and the consideration for it or, if there is no consideration, the way in which it arises; but if the person to whom the debt is owed holds any security in respect of the debt of which the Authority is aware (1) the demand must specify the nature of the security and the value which the Authority puts on it as at the date of the demand; and (2) the amount of which payment is claimed by the demand must be the full amount of the debt less the amount specified as the value of the security: r 4(4). The demand must also state the grounds on which it is alleged that the individual appears to have no reasonable prospect of paying the debt: r 4(5). For these purposes, 'debt' means the sum referred to in the 2000 Act s 372(4)(a); 'person' excludes a body of persons corporate or unincorporate; and 'individual' has the meaning given by s 372(7) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 501): SI 2001/3634 r 2.

NOTE 1--SI 1986/1925 Forms 6.1, 6.2 and 6.3 substituted: SI 2003/1730.

NOTE 2--See *Coulter v Chief Constable of Dorset Police* [2004] EWCA Civ 1259, [2005] 1 WLR 130.

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### 155. Information to be given.

The statutory demand must include an explanation to the debtor of the following matters:



- 257 (1) the purpose of the demand, and the fact that, if the debtor does not comply with the demand, bankruptcy proceedings may be commenced against him;
- 258 (2) the time within which the demand must be complied with if that consequence is to be avoided;
- 259 (3) the methods of compliance which are open to the debtor; and
- 260 (4) his right to apply to the court<sup>1</sup> for the statutory demand to be set aside<sup>2</sup>.

The demand must specify one or more named individuals with whom the debtor may, if he wishes, enter into communication with a view to securing or compounding for the debt to the satisfaction of the creditor or, as the case may be, establishing to the creditor's satisfaction that there is a reasonable prospect that the debt will be paid when it falls due; and, in the case of any individual so named in the demand, his address and telephone number, if any, must be given<sup>3</sup>.

1 le under the Insolvency Rules 1986, SI 1986/1925, r 6.4: see para 157 post.

2 Ibid r 6.2(1).

3 Ibid r 6.2(2).

## UPDATE

### 124-159 Bankruptcy petitions

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 155 Information to be given

TEXT AND NOTES--SI 1986/1925 r 6.2 does not apply to a demand made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 372(4)(a) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 501): Bankruptcy (Financial Services and Markets Act 2000) Rules 2001, SI 2001/3634, r 5(1). A demand must include an explanation to the individual of the following matters: (1) the purpose of the demand and the fact that, if the individual does not comply with the demand, bankruptcy proceedings may be commenced against him; (2) the time within which the demand must be complied with, if that consequence is to be avoided; (3) the methods of compliance which are open to the individual; and (4) the individual's right to apply to the court for the demand to be set aside: SI 2001/3634 r 5(2). The demand must specify the name and address (and telephone number, if any) of one or more persons with whom the individual may, if he wishes, enter into communication with a view to establishing to the Authority's satisfaction that there is a reasonable prospect that the debt will be paid when it falls due or (as the case may be) that the debt will be scoured or compounded: r 5(3). For the meaning of 'individual' and 'debt' for these purposes see PARA 154.

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## 156. Requirements as to service.

The creditor is<sup>1</sup> under an obligation to do all that is reasonable for the purpose of bringing the statutory demand to the debtor's attention and, if practicable in the particular circumstances, to cause personal service of the demand to be effected<sup>2</sup>.

Where the statutory demand is for payment of a sum due under a judgment or order of any court and the creditor knows, or believes with reasonable cause:

- 261 (1) that the debtor has absconded or is keeping out of the way with a view to avoiding service; and
- 262 (2) there is no real prospect of the sum being recovered by execution or other process,

the demand may be advertised<sup>3</sup> in one or more newspapers; and the time limited for compliance with the demand runs from the date of the advertisement's appearance or, as the case may be, its first appearance<sup>4</sup>.

1 le by virtue of the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 Ibid r 6.3(2). The creditor must take all reasonable steps to bring the statutory demand to the debtor's attention: *Re H (a debtor) (38-SD of 1997)* (2000) Times, 10 May, CA; and see *Regional Collection Services Ltd v Heald* [2000] BPIR 661, CA. The court may decline to file the petition if not satisfied that the creditor has discharged the obligation imposed on him by the Insolvency Rules 1986, SI 1986/1925, r 6.3(2): see r 6.11(9); and para 166 post.

Rule 6.11 (as amended) (see para 166 post) has effect as regards service of the statutory demand, and proof of that service by affidavit to be filed with a bankruptcy petition: r 6.3(1). As to the use of witness statements instead of affidavits in insolvency proceedings see r 7.57(5), (6) (as substituted); and para 793 post.

Where it is not possible to effect prompt personal service, service may be effected by other means such as first-class post or insertion through a letter box: *Practice Direction-Insolvency Proceedings* para 11.1. Service of a statutory demand by post is deemed to be effected on the seventh day after posting: para 11.5. In all cases where substituted service is effected, the creditor must have taken all those steps which would justify the court making an order for substituted service of a petition; and failure to comply with these requirements may result in the court declining to file the petition: para 11.3; Insolvency Rules 1986, SI 1986/1925, r 6.11(9). As to orders for the substituted service of a petition see *Practice Direction-Insolvency Proceedings* para 11.4; and para 171 post.

The Insolvency Rules 1986, SI 1986/1925, r 6.3(2) applies to service of a statutory demand outside the jurisdiction: *Practice Direction-Insolvency Proceedings* para 10.2. A creditor wishing to serve a statutory demand outside the jurisdiction in a foreign country with which a civil procedure Convention has been made, including the Hague Convention (The Hague, 15 November 1965; Cmnd 3986), may and, if the assistance of a British consul is desired, must adopt the procedure prescribed by CPR r 6.25 (see CIVIL PROCEDURE vol 11 (2009) para 175): *Practice Direction-Insolvency Proceedings* para 10.3. In all other cases, service of the demand must be effected by private arrangement in accordance with the Insolvency Rules 1986, SI 1986/1925, r 6.3(2) and local foreign law: *Practice Direction-Insolvency Proceedings* para 10.4. When a statutory demand is to be served out of the jurisdiction, the time limits of 21 days and 18 days respectively referred to in the demand must be amended in accordance with *Practice Direction-Service* (2000) PD 6A (see CIVIL PROCEDURE vol 11 (2009) para 168 et seq): *Practice Direction-Insolvency Proceedings* para 10.5. A creditor should amend the statutory demand as follows: (1) for any reference to 18 days there must be substituted the appropriate number of days set out in the table plus four days; and (2) for any reference to 21 days must be substituted the appropriate number of days in the table plus seven days: para 10.6.

3 Advertisement can only be used as a means of substituted service where: (1) the demand is based on a judgment or order of the court; (2) the debtor has absconded or is keeping out of the way with a view to avoiding service; and (3) there is no real prospect of the sum due being recovered by execution or other process: *Practice Direction-Insolvency Proceedings* para 11.2. For an acceptable form of advertisement see para 11.2.

4 Insolvency Rules 1986, SI 1986/1925, r 6.3(3).

## UPDATE

### 124-159 Bankruptcy petitions

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 156 Requirements as to service

NOTES--For the purposes of a demand made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 372(4)(a) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 501), SI 1986/1925 r 6.3 applies as if references to the debtor were references to an individual, and references to the creditor were references to the Financial Services Authority: Bankruptcy (Financial Services and Markets Act 2000) Rules 2001, SI 2001/3634, r 6(1). For the meaning of 'individual' for these purposes see PARA 154.

TEXT AND NOTES 3, 4--SI 1986/1925 r 6.3(3) amended: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(6) BANKRUPTCY PETITIONS/(ii) Creditor's Petition/E. THE STATUTORY DEMAND/157. Application to set aside statutory demand.

### 157. Application to set aside statutory demand.

Within the period of 18 days from the date of the service on him of the statutory demand or, where the demand is advertised in a newspaper<sup>1</sup>, from the date of the advertisement's appearance or, as the case may be, its first appearance, the debtor may apply to the appropriate court<sup>2</sup> for an order setting the statutory demand aside<sup>3</sup>.

As from, inclusive, the date on which the application is filed in court<sup>4</sup>, the time limited for compliance with the statutory demand ceases to run, subject to any order of the court<sup>5</sup> where the application is dismissed<sup>6</sup>.

The debtor's application must be supported by an affidavit<sup>7</sup> specifying the date on which the statutory demand came into his hands, and stating the grounds on which he claims that it should be set aside; and the affidavit must have exhibited to it a copy of the statutory demand<sup>8</sup>.

1    Ie pursuant to the Insolvency Rules 1986, SI 1986/1925, r 6.3: see para 156 ante.

2    Where the creditor issuing the statutory demand is a Minister of the Crown or a government department, and: (1) the debt in respect of which the demand is made, or a part of it equal to or exceeding the bankruptcy level, is the subject of a judgment or order of any court; and (2) the statutory demand specifies the date of the judgment or order and the court in which it was obtained, but indicates the creditor's intention to present a bankruptcy petition against the debtor in the High Court, the appropriate court under *ibid* r 6.4 is the High Court; and in any other case it is that to which the debtor would, in accordance with r 6.40(1), (2) (see para 188 post), present his own bankruptcy petition: r 6.4(2). For the meaning 'the bankruptcy level' see para 126 note 5 ante.

3    *Ibid* r 6.4(1). For the prescribed form of application see rr 6.4, 12.7(1), (2), Sch 4, Form 6.4. Where, by any provision in the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) or by the Insolvency Rules 1986, SI

1986/1925 (as amended), the time for doing anything is limited, the court may extend the time, either before or after it has expired, on such terms, if any, as it thinks fit: Insolvency Act 1986 s 376. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 376 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

The application and written evidence in support, exhibiting a copy of the statutory demand, must be filed in court within 18 days of service of the statutory demand: *Practice Direction-Insolvency Proceedings* para 12.1. Where service is effected by advertisement in a newspaper, the period of 18 days is calculated from the date of the first appearance of the advertisement: para 12.1. Three copies of each document must be lodged with the application to enable the court to serve notice of the hearing date on the applicant, the creditor and the person named in Part B of the statutory demand: para 12.1. Where, to avoid expense, copies of the documents are not lodged with the application in the High Court, any order of the registrar fixing a venue is conditional on copies of the documents being lodged on the next business day after the registrar's order; otherwise the application will be deemed to have been dismissed: para 12.2.

A debtor who wishes to apply to set aside a statutory demand after the expiration of 18 days from the date of service of the statutory demand must apply for an extension of time within which to apply: para 12.5. If the applicant wishes to apply for an injunction to restrain presentation of a petition, the application must be made to the judge: para 12.5. As to the appropriate form for an application for extension of time see para 12.5.

4 For the meaning of 'file in court' see para 95 note 10 ante.

5 le under the Insolvency Rules 1986, SI 1986/1925, r 6.5(6): see para 158 post.

6 Ibid r 6.4(3).

7 As to the use of witness statements instead of affidavits in insolvency proceedings see ibid r 7.57(5), (6) (as substituted); and para 793 post.

8 Ibid r 6.4(4). For the prescribed form of affidavit in support of an application to set aside statutory demand see rr 6.4, 12.7(1), (2), Sch 4, Form 6.5.

## UPDATE

### 124-159 Bankruptcy petitions

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 157 Application to set aside statutory demand

TEXT AND NOTES--For the purposes of a demand made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 372(4)(a) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 501), SI 1986/1925 r 6.4 applies as if references to the debtor were references to an individual: Bankruptcy (Financial Services and Markets Act 2000) Rules 2001, SI 2001/3634, r 7(a). For the meaning of 'individual' for these purposes see PARA 154.

TEXT AND NOTES 1-3--SI 1986/1925 r 6.4(1) amended: SI 2009/642.

NOTE 2--For the purposes of a demand made under the 2000 Act s 372(4)(a), SI 1986/1925 r 6.4(2) applies as if the words 'the creditor issuing the statutory demand is a Minister ... and;' were omitted, and as if the reference to the creditor in head (2) was to the Financial Services Authority: SI 2001/3634 r 7(b), (c).

PETITIONS/(ii) Creditor's Petition/E. THE STATUTORY DEMAND/158. Hearing of application to set aside.

### **158. Hearing of application to set aside.**

On receipt of an application to set aside a statutory demand<sup>1</sup>, the court may, if satisfied that no sufficient cause is shown for it, dismiss it without giving notice to the creditor; and, as from, inclusive, the date on which the application is dismissed, the time limited for compliance with the statutory demand runs again<sup>2</sup>. If, however, the application is not so dismissed, the court must fix a venue<sup>3</sup> for it to be heard, and must give at least seven days' notice of it to:

- 263 (1) the debtor or, if the debtor's application was made by a solicitor<sup>4</sup> acting for him, to the solicitor;
- 264 (2) the creditor; and
- 265 (3) whoever is named in the statutory demand as the person with whom the debtor may enter into communication with reference to the demand, or, if more than one person is so named, the first of them<sup>5</sup>.

On the hearing of the application, the court must consider the evidence then available to it, and may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate<sup>6</sup>.

The court may grant the application if:

- 266 (a) the debtor appears to have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand<sup>7</sup>; or
- 267 (b) the debt is disputed on grounds which appear to the court to be substantial<sup>8</sup>; or
- 268 (c) it appears that the creditor holds some security in respect of the debt claimed by the demand and either the statutory provisions relating to the disclosure of the nature and amount of the debt<sup>9</sup> are not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt<sup>10</sup>; or
- 269 (d) the court is satisfied on other grounds that the demand ought to be set aside<sup>11</sup>.

Where the creditor holds some security in respect of his debt, and the statutory provisions relating to the disclosure of the nature and amount of the debt<sup>12</sup> are complied with in respect of it but the court is satisfied that the security is undervalued in the statutory demand, the creditor may be required to amend the demand accordingly, but without prejudice to his right to present a bankruptcy petition by reference to the original demand<sup>13</sup>. If the court dismisses the application, it must make an order authorising the creditor to present a bankruptcy petition either forthwith, or on or after a date specified in the order; and a copy of the order must be sent by the court forthwith to the creditor<sup>14</sup>.

1    le under the Insolvency Rules 1986, SI 1986/1925, r 6.4: see para 157 ante.

2    Ibid r 6.5(1).

3    For the meaning of 'venue' see para 84 note 21 ante.

4 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

5 Insolvency Rules 1986, SI 1986/1925, r 6.5(2).

6 Ibid r 6.5(3).

7 Ibid r 6.5(4)(a). When the debtor claims to have a counterclaim, set-off or cross-demand, whether or not he could have raised it in the action in which the judgment or order was obtained, which equals or exceeds the amount of the debt or debts specified in the statutory demand the court will normally set aside the statutory demand if, in its opinion, on the evidence, there is a genuine triable issue: *Practice Direction-Insolvency Proceedings* para 12.4(a).

Where the amount of the counterclaim, set-off or cross-demand does not equal or exceed the debt specified in the statutory demand, the court will not set the statutory demand aside: *Re A Debtor (No 10 of 1988, Aylesbury)*, ex p *Lovell Construction (Southern) Ltd v Debtor* [1989] 2 All ER 39, sub nom *Re A Debtor (No 10 of 1988)* [1989] 1 WLR 405; *AIB Finance Ltd v Debtors* [1997] 4 All ER 677 (affd on other grounds [1998] 2 All ER 929, [1998] 1 BCLC 665, CA). Where a right of equitable set-off is asserted but cannot be shown to exceed the amount claimed in the statutory demand, the statutory demand will not be set aside, since the court is entitled to make a bankruptcy order in respect of the net sum: *TSB Bank plc v Platts* [1998] 2 BCLC 1, sub nom *TSB Bank plc v Platts (No 2)* [1998] BPIR 284, CA. Where the counterclaim, set-off or cross-demand is unsustainable either in fact or in law, the statutory demand will not be set aside: *AIB Finance Ltd v Debtors* [1998] 2 All ER 929, [1998] 1 BCLC 665, CA.

It is not necessary that the counterclaim or cross-demand is available for set-off in law against the claimed debt: *Re Debtors (Nos 4449 and 4450 of 1998)* [1999] 1 All ER (Comm) 149. A clause in a reconstruction contract requiring sums owed to be paid without any set-off or counterclaim does not preclude a debtor who has a counterclaim from having a statutory demand set aside: *Re A Debtor (No 544/SD/98)* [2000] 1 BCLC 103 at 110, CA. A debtor can assert a counterclaim or cross-demand against a debt claimed in a statutory demand which arises from a dishonoured cheque: *Hofer v Strawson* [1999] 2 BCLC 336, [1999] BPIR 501. It is not necessary that a counterclaim or cross-demand arises in favour of the debtor in the same capacity as the debt demanded from him in the statutory demand: *Re A Debtor (No 87 of 1999)* [2000] BPIR 589. However, the legal character of the counterclaim or cross-demand relied on by a debtor has to be the same as the legal character of the debt claimed in the statutory demand: *Hurst v Bennett* [2001] EWCA Civ 182, [2001] 2 BCLC 290, [2001] BPIR 287. In relation to the winding up of companies see also *Re Bayoil SA, Seawind Tankers Corp v Bayoil SA* [1999] 1 All ER 374, [1999] 1 WLR 147, CA.

8 Insolvency Rules 1986, SI 1986/1925, r 6.5(4)(b). Where the debtor disputes the debt, not being a debt subject to a judgment or order, the court will normally set aside the statutory demand if, in its opinion, on the evidence, there is a genuine triable issue: *Practice Direction-Insolvency Proceedings* para 12.4. The existence of an arguable point of law is not sufficient unless it can be shown that the point can only be resolved at trial: *Cale v Assiudoman KPS (Harrow) Ltd* [1996] BPIR 245.

Where a debt is genuinely disputed, the question whether or not the debtor is insolvent is irrelevant: see *Re A Company (No 00212 of 1995)* (1995) Times, 7 April, applying *Mann v Goldstein* [1968] 2 All ER 769, [1968] 1 WLR 1091 (company case). The fact that a debtor may be able to argue that he is not insolvent or that the creditor may be able to obtain payment by other means does not prevent a creditor from serving a demand followed, if there is no payment, by a petition: *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114, [1986] BCLC 26 (company case). The court is not obliged to accept that there is a substantial dispute because unconditional permission to defend proceedings has been given under CPR Pt 24 (see CIVIL PROCEDURE vol 11 (2009) PARA 524 et seq), although this fact may be highly persuasive; the court may investigate the evidence and reach its own conclusion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197, CA (company case).

It is not open to a creditor in response to an application to set aside a statutory demand to seek to rely on a debt other than the one claimed in the demand: *Re A Debtor (No 44 of 1997)*, *Bennett v Filmer* [1998] BPIR 444. An overstatement of the debt is not of itself a ground for setting aside a statutory demand: *Re A Debtor (No 1 of 1987, Lancaster)*, ex p *Debtor v Royal Bank of Scotland plc* [1989] 2 All ER 46, sub nom *Re A Debtor (No 1 of 1987)* [1989] 1 WLR 271, CA; *Re A Debtor (No 490/SD/1991)*, ex p *Debtor v Printline (Offset) Ltd* [1992] 2 All ER 664, [1992] 1 WLR 507; *Re A Debtor (No 657/SD/91)*, ex p *IRC v Debtor* [1992] STC 751, [1993] BCLC 180. Where a debt is partly disputed but the undisputed element is below the bankruptcy level, the court should generally exercise its discretion under the Insolvency Rules 1986, SI 1986/1925, r 6.5(4)(d) (see infra) to dismiss the statutory demand: *Re A Debtor (Nos 49 and 50 of 1992)* [1995] Ch 66, [1994] 3 WLR 847, CA.

Where a statutory demand is based on a judgment or order, the court will not at the hearing of an application to set aside the statutory demand go behind the judgment or order and inquire into the validity of the debt nor, as a general rule, will it adjourn the application to await the result of an application to set aside the judgment order: *Practice Direction-Insolvency Proceedings* para 12.3. The court may, however, stand proceedings over where it is alleged that a judgment was obtained by fraud and impeachment proceedings are instituted: *Bowes*

*v Directors of Hope Life Assurance and Guarantee Co* (1865) 11 HL Cas 389 (company case). As to the power of the court to go behind a judgment or order on the hearing of the petition see para 196 note 3 post.

Where a statutory demand is served in respect of a debt which is not properly owed by the debtor or which to the knowledge of the petitioner is genuinely disputed by the debtor, the presentation of the statutory demand may be an abuse of process and the demand may be set aside with an order for costs to be paid on an indemnity basis: see *Re A Company (No 0012209 of 1991)* [1992] 2 All ER 797, [1992] 1 WLR 351 (company case); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 482. See further para 185 post.

9 le the Insolvency Rules 1986, SI 1986/1925, r 6.1(5): see para 154 ante.

10 Ibid r 6.5(4)(c). A statutory demand which fails to state that security is held for the debt may be set aside except where it can be demonstrated that the debtor has suffered no prejudice by reason of the omission: *Re A Debtor (No 106 of 1992)*, *Khan v Breezevale SARL* [1996] BPIR 190. Where there is a dispute as to the value of security held by the creditor, the court may determine the dispute either at the hearing of an application to set aside the statutory demand or at the hearing of the petition itself: *Platts v Western Trust & Savings Ltd* [1996] BPIR 339, CA.

11 Insolvency Rules 1986, SI 1986/1925, r 6.5(4)(d). It is not enough for a debtor seeking to invoke 'other grounds' to state that a statutory demand served on him was perplexing; even though the demand failed to give clear particulars as to how the amount claimed was ascertained, the debtor should show what he says is the true position as between himself and the creditor: *Re A Debtor (No 1 of 1987, Lancaster)*, ex p *Debtor v Royal Bank of Scotland plc* [1989] 2 All ER 46, sub nom *Re a Debtor (No 1 of 1987)* [1989] 1 WLR 271, CA. The grounds under which a statutory demand might be set aside under the Insolvency Rules 1986, SI 1986/1925, r 6.5(4)(d) are of the same substance as those set out in r 6.5(4)(a)-(c) (see supra): *Re A Debtor (No 1 of 1987, Lancaster)*, ex p *Debtor v Royal Bank of Scotland plc* supra. Such grounds include where the debtor has admitted that the debt is due and owing and is prepared to secure or compound it to the creditor's satisfaction: *Budge v AF Budge (Contractors) Ltd (in receivership and liquidation)* [1997] BPIR 366, CA. This may include the situation where a payment is to be made by the debtor to reduce the debt to below the bankruptcy level (*City Electrical Factors Ltd v Hardingham* [1996] BPIR 541) or where payment of a debt demanded in a foreign currency is to be paid in sterling at an appropriate rate (*Re A Debtor (No 51-SD-1991)*, ex p *Ritchie Bros Auctioneers v Debtor* [1993] 2 All ER 40, [1992] 1 WLR 1294). However, it is not open to a debtor to argue that a statutory demand should be set aside on the basis that the creditor has unreasonably refused an offer to settle: *Re A Debtor (No 415-SD-1993)*, ex p *Debtor v IRC* [1994] 2 All ER 168, [1994] 1 WLR 917. Cf the Insolvency Act 1986 s 271(3); and para 195 post. The fact that there is a risk of inconsistent verdicts in the ordinary and bankruptcy jurisdictions of the county court does not constitute a ground to set aside a statutory demand: *Re A Debtor (No 90 of 1997)* (1998) Times, 1 July.

A formal defect in the statutory demand which does not mislead the debtor, as where the correct date of a guarantee is misstated, does not invalidate the demand: *Re A Debtor (No 190 of 1987)* (1988) Times, 21 May. Similarly, a formal defect in the statutory demand, such as the failure to state the consideration for the debt, will not ordinarily lead to a petition based on the demand being dismissed: *Re Blackman (a debtor)* [1999] BCC 446.

12 See note 9 supra.

13 Insolvency Rules 1986, SI 1986/1925, r 6.5(5).

14 Ibid r 6.5(6). For the prescribed form of order setting aside a statutory demand see rr 6.5, 12.7(1), (2), Sch 4, Form 6.6. It is not open to a debtor to raise arguments which have been raised on an unsuccessful application to set aside a statutory demand on the hearing of the petition unless there has been some change of circumstances between the hearing of the application to set aside the demand and the hearing of the petition: *Turner v Royal Bank of Scotland* [2000] BPIR 683, CA; and see *Re a Debtor (No 27 of 1990)*, *Brillouet v Hachette Magazines Ltd* [1996] BPIR 518 at 522, CA; cf *Eberhardt & Co Ltd v Mair* [1995] 3 All ER 963, [1995] 1 WLR 1180.

In relation to an appeal from a decision on an application to set aside a statutory demand, the principles in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA do not apply and fresh evidence may be admitted: *Royal Bank of Scotland v Binnell* [1996] BPIR 352; *Re a Debtor (No 223 SD of 1995)*, *Norman Laurier v United Overseas Bank Ltd* [1996] BPIR 635; *Purvis v Customs & Excise Comrs* [1999] BPIR 396; *Re A Debtor (No SD8/9 of 1998)* [2000] BCC 36, sub nom *Salvidge v Hussein* [1999] BPIR 410; and see para 745 post. However, such an appeal is in the nature of a true appeal; and, accordingly, events occurring after the decision under appeal are not relevant to the appeal: *Cozens v Customs & Excise Comrs* [2000] BPIR 252, CA. See also *Clifton v Barclays Bank plc* [1998] BPIR 565. See further para 739 et seq post.

## UPDATE

### 124-159 Bankruptcy petitions

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **158 Hearing of application to set aside**

TEXT AND NOTES--For the purposes of a demand made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 372(4)(a) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 501), SI 1986/1925 r 6.5 applies as if references to the debtor were references to an individual, and, subject to the exceptions set out, as if references to the creditor were references to the Financial Services Authority: Bankruptcy (Financial Services and Markets Act 2000) Rules 2001, SI 2001/3634, r 6(1) (a), (b). Reference to the creditor in heads (2) and (c) of the text should be read as a reference to the person to whom the debt is owed and, in relation to head (2) of the text only, as if the reference to a creditor also included a reference to the Financial Services Authority: r 6(1)(c), (2). For the meaning of 'individual', 'person' and 'debt' for these purposes see PARA 154.

NOTE 4--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

NOTE 7--The test of whether there is a genuine triable issue is for all practical purposes the same as the test under CPR 24.2(a) of whether there is a real prospect of success in relation to the making of a summary judgment: *Ashworth v Newnote Ltd* [2007] EWCA Civ 793, [2007] All ER (D) 436 (Jul). The fact that a judge has previously held the issue raised by the debtor is too insubstantial to be pleaded, is an important consideration in deciding whether the debtor has a genuine triable issue, but it is not determinative: *Thomas-Everard v Society of Lloyd's* (2003) Times, 28 August. The rule extends to a situation where the demand is based on a costs order made in the proceedings in which the counterclaim is being pursued: *Popely v Popely* [2004] EWCA Civ 463, [2004] All ER (D) 346 (Apr). See also *Ahmed v Landstone Leisure Ltd* [2009] EWHC 125 (Ch), [2009] All ER (D) 69 (Feb), [2009] BPIR 227; *Shaw v MFP Foundations & Piling Ltd* [2010] EWHC 9 (Ch), [2010] All ER (D) 71 (Jan).

NOTE 10--The debtor, when estimating the debt against the value of the security, can not include any potential cost of enforcing the debt: *Owo-Samson v Barclays Bank plc* [2003] EWCA Civ 714, [2003] All ER (D) 285 (May). See also *Fagg v Rushton* [2007] EWHC 657 (Ch), [2007] BPIR 1059.

NOTE 11--*Remblance v Octagon Assets Ltd* [2009] EWCA Civ 581, [2010] 1 BCLC 10 (service of statutory demand on guarantor on basis that could not claim against debtor by reason of cross-claim unjust).

TEXT AND NOTES 12, 13--SI 1986/1925 r 6.5(5) does not apply to a demand made under the Financial Services and Markets Act 2000 s 372(4)(a): SI 2001/3634 r 6(3). In relation to such demands, where the person to whom the debt is owed holds some security in respect of his debt, and r 4(4) (see PARA 154) is complied with in respect of it but the court is satisfied that the security is undervalued in the demand, the Financial Services Authority may be required to amend the demand accordingly, but without prejudice to its right to present a bankruptcy by reference to the original demand: r 6(3).



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### **(iii) Debtor's Petition**

#### **159. Grounds of debtor's petition.**

A debtor's petition<sup>1</sup> may be presented to the court only on the grounds that the debtor is unable to pay his debts<sup>2</sup>; and the petition must be accompanied by a statement of the debtor's affairs<sup>3</sup>, verified by affidavit<sup>4</sup>, containing:

- 270 (1) such particulars of the debtor's creditors and of his debts and other liabilities and of his assets as may be prescribed; and
- 271 (2) such other information as may be prescribed<sup>5</sup>.

1 In the Insolvency Act 1986 'debtor's petition' means a bankruptcy petition presented by the debtor himself under s 264(1)(b) (see para 124 head (2) ante); s 385(1). As to the application of s 385 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 6 note 8 ante.

2 Ibid s 272(1). The test of whether a person is unable to pay his debts is not whether his assets exceed his liabilities but whether he is able to pay his debts as and when they fall due: *Re Coney (a bankrupt)* [1998] BPIR 333.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, a debtor's petition in the prescribed form may be presented to the court only on the grounds that the estate of a deceased debtor is insolvent: Insolvency Act 1986 s 272(1) (amended by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 6). For the prescribed form of petition see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 6. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

As to the modification of the Insolvency Act 1986 s 272 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 821, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1262, 1270.

3 The Insolvency Rules 1986, SI 1986/1925, rr 6.67-6.72 (see para 252 et seq post) apply with respect to the statement of affairs: r 6.41(2). See also r 5.8; and para 93 ante. For the prescribed form of statement of affairs see rr 6.41, 12.7(1), (2), Sch 4, Form 6.28.

4 As to the use of witness statements instead of affidavits in insolvency proceedings see *ibid* r 7.57(5), (6) (as substituted); and para 793 post.

5 Insolvency Act 1986 s 272(2); Insolvency Rules 1986, SI 1986/1925, r 6.41(1). As to material omissions in such a statement see the Insolvency Act 1986 s 356(1) and para 715 post; and as to the use of such a statement in evidence against the debtor see s 433 (as amended) and para 786 post.

### **UPDATE**

#### **124-159 Bankruptcy petitions**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **159 Grounds of debtor's petition**

NOTE 2--SI 1986/1999 Sch 3 Form 6 substituted: SI 2002/1309.

NOTE 3--SI 1986/1925 Sch 4 Form 6.28 substituted: SI 2005/2114.

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## **(7) PROCEDURE ON BANKRUPTCY PETITION**

### **(i) Creditor's Petition**

#### ***A. THE APPROPRIATE COURT***

##### **160. Court to which petition to be presented.**

In the following cases, the petition must be presented to the High Court:

- 272 (1) if the petition is presented by a Minister of the Crown or a government department and either in any statutory demand<sup>1</sup> on which the petition is based the creditor has indicated the intention to present a bankruptcy petition to that court, or the petition is presented where the debt arises under a judgment or order of the court and execution is returned unsatisfied<sup>2</sup>;
- 273 (2) if the debtor has resided<sup>3</sup> or carried on business<sup>4</sup> within the London insolvency district<sup>5</sup> for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period in those six months than in any other insolvency district<sup>6</sup>; or
- 274 (3) if the debtor is not resident in England and Wales; or
- 275 (4) if the petitioner is unable to ascertain the residence of the debtor, or his place of business<sup>7</sup>.

In any other case, the petition must be presented to the county court for the insolvency district in which the debtor has resided or carried on business for the longest period during those six months<sup>8</sup>.

If, however, the debtor has for the greater part of those six months carried on business in one insolvency district and resided in another, the petition must be presented to the court for the insolvency district in which he has carried on business<sup>9</sup>.

If the debtor has during those six months carried on business in more than one insolvency district, the petition must be presented to the court for the insolvency district in which is, or has been for the longest period in those six months, his principal place of business<sup>10</sup>.

Notwithstanding any other provision, where there is in force for the debtor a voluntary arrangement under Part VIII of the Insolvency Act 1986<sup>11</sup>, the petition must be presented to the court to which the nominee's report<sup>12</sup> was submitted<sup>13</sup>.

The petition must contain sufficient information to establish that it is brought in the appropriate court<sup>14</sup>.

<sup>1</sup> As to statutory demands see para 154 et seq ante.

<sup>2</sup> I.e. under the Insolvency Act 1986 s 268(1)(b): see para 127 head (2) ante.

- 3 For the meaning of 'reside' see para 125 note 4 ante.
- 4 For the meaning of 'carry on business' see para 125 note 5 ante.
- 5 As to the London insolvency district see para 7 note 1 ante.
- 6 As to insolvency districts generally see para 7 ante.
- 7 Insolvency Rules 1986, SI 1986/1925, r 6.9(1). For the meaning of 'place of business' see para 125 note 5 ante. Part 6 Ch 2 (rr 6.6-6.36) (as amended) (see *infra*; and para 161 *et seq post*) relate to a creditor's petition, and the making of a bankruptcy order thereon; and in Pt 6 Ch 2 (rr 6.6-6.36) (as amended) 'the debt' means, except where the context otherwise requires, the debt, or debts, in respect of which the petition is presented: r 6.6. Part 6 Ch 2 (rr 6.6-6.36) (as amended) also applies to a petition presented under the Insolvency Act 1986 s 264(1)(c) (see para 124 head (3) ante) with any necessary modifications: Insolvency Rules 1986, SI 1986/1925, r 6.6. For the prescribed form of bankruptcy petition for default in connection with a voluntary arrangement see rr 6.6, 12.7(1), (2), Sch 4, Form 6.10.
- 8 *Ibid* r 6.9(2).
- 9 *Ibid* r 6.9(3).
- 10 *Ibid* r 6.9(4).
- 11 *Ie* under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 *et seq ante*.
- 12 See para 95 ante.
- 13 Insolvency Rules 1986, SI 1986/1925, r 6.9(4A) (added by SI 1987/1919).
- 14 Insolvency Rules 1986, SI 1986/1925, r 6.9(5).

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **160 Court to which petition to be presented**

TEXT AND NOTES--SI 1986/1925 r 6.9 substituted by r 6.9A: SI 2010/686.

TEXT AND NOTES 1, 2--For the purposes of a demand made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 372(4)(a) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 501), SI 1986/1925 r 6.9 applies as if for head (1) there were substituted 'if in any demand on which the petition is based the Authority has indicated the intention to present a bankruptcy petition to that court': Bankruptcy (Financial Services and Markets Act 2000) Rules 2001, SI 2001/3634, r 8.

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## ***B. CONTENTS OF PETITION***

### **161. Identification of debtor.**

The petition must state the following matters with respect to the debtor, so far as they are within the petitioner's knowledge:

- 276 (1) his name, place of residence<sup>1</sup> and occupation, if any;
- 277 (2) the name or names in which he carries on business<sup>2</sup>, if other than his true name, and whether, in the case of any business of a specified nature, he carries it on alone or with others;
- 278 (3) the nature of his business and the address or addresses at which he carries it on;
- 279 (4) any name or names, other than his true name, in which he has carried on business at or after the time when the debt<sup>3</sup> was incurred, and whether he has done so alone or with others;
- 280 (5) any address or addresses at which he has resided or carried on business at or after that time, and the nature of that business<sup>4</sup>.

The particulars of the debtor so given determine the title of the proceedings<sup>5</sup>; and, if to the petitioner's personal knowledge the debtor has used any name other than the one specified under head (1) above, that fact must be stated in the petition<sup>6</sup>.

Guidance as to the manner in which bankruptcy petitions should be completed has been given<sup>7</sup>.

1 For the meaning of 'residence' see para 125 note 4 ante.

2 For the meaning of 'carry on business' see para 125 note 5 ante.

3 For the meaning of 'the debt' see para 160 note 7 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.7(1).

5 Ibid r 6.7(2). As to amendment of the title of proceedings see para 199 post.

6 Ibid r 6.7(3).

7 See *Practice Direction-Insolvency Proceedings* para 15. To help practitioners complete the forms of a creditor's bankruptcy petition (see the Insolvency Rules 1986, SI 1986/1925, rr 6.6-6.12, 12.7(1), (2), Sch 4, Forms 6.7-6.9) attention is drawn to the following points:

- 38 (1) the petition does not require dating, signing or witnessing;
  - 39 (2) in the title it is only necessary to recite the debtor's name eg Re John William Smith or Re JW Smith (male); any alias or trading name will appear in the body of the petition, and this also applies to all other statutory forms other than those which require the 'full title';
  - 40 (3) where the petition is based on a statutory demand, only the debt claimed in the demand may be included in the petition;
  - 41 (4) attention is drawn to r 6.8(1) (a)-(c) (as amended) (see para 162 heads (1)-(3) post);
  - 42 (5) with regard to date of service of the statutory demand:
19. (a) in the case of personal service, the date of service as set out in the affidavit of service should be recited and whether service is effected before/after 17.00 hours on Monday to Friday or at any time on a Saturday or a Sunday (see CPR 6.7(2), (3); and CIVIL PROCEDURE vol 11 (2009) PARA 151);
- 19
20. (b) in the case of substituted service, otherwise than by advertisement, the date alleged (see *Practice Direction-Insolvency Proceedings* para 11; and para 171 post) in the affidavit of service should be recited;
- 20

21. (c) in the strictly limited case of service by advertisement under the Insolvency Rules 1986, SI 1986/1925, r 6.3 (see para 156 ante), the date to be alleged is the date of the advertisement's appearance or, as the case may be, its first appearance (see r 6.3(3) and para 156 ante; r 6.11(8) and para 166 post);  
21
  - 43 (6) there is no need to include in the petition details of the person authorised to present the petition;
  - 44 (7) with regard to certificates at the end of the petition:
22. (a) the period of search for prior petitions has been reduced to 18 months;  
22
23. (b) where a statutory demand is based wholly or in part on a county court judgment, the following certificate is to be added:  
23
24. 'I/We certify that on the       day of       20       I/we attended on the       county court and was/were informed by an officer of the court that no money had been paid into court in the action or matter       v       Claim No       pursuant to the statutory demand.'  
24
25. This certificate will not be required when the demand also requires payment of a separate debt, not based on a county court judgment, the amount of which exceeds the bankruptcy level (see para 126 note 5 ante);  
25
  - 45 (8) the deposit payable on presentation of the petition (see para 164 post) will be taken by the court and forwarded to the official receiver; in the High Court the petition fee and deposit should be handed to the Supreme Court Accounts Office, Fee Stamping Room, who will record the receipt and will impress two entries on the original petition, one in respect of the court fee and the other in respect of the deposit; in the county court the petition fee and deposit should be handed to the duly authorised officer of the court's staff who will record its receipt; in either case cheque(s) for the whole amount should be made payable to 'HM Paymaster General':

*Practice Direction-Insolvency Proceedings paras 15.1-15.8.*

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 161 Identification of debtor

TEXT AND NOTES--See SI 1986/1925 r 6.235B (persons at risk of violence) (added by SI 2010/686).

NOTE 7--CPR Pt 6 substituted: SI 2008/2178. SI 1986/1925 Sch 4 Form 6.9 substituted: SI 2005/527.

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### 162. Identification of the debt.

There must be stated in the petition, with reference to every debt<sup>1</sup> in respect of which it is presented:

- 281 (1) the amount of the debt, the consideration for it<sup>2</sup>, or, if there is no consideration, the way in which it arises, and the fact that it is owed to the petitioner;
- 282 (2) when the debt was incurred or became due;
- 283 (3) if the amount of the debt includes any charge by way of interest not previously notified to the debtor as a liability of his, or any other charge accruing from time to time, the amount or rate of the charge, separately identified, and the grounds on which it is claimed to form part of the debt, provided that such amount or rate must, in the case of a petition based on a statutory demand<sup>3</sup>, be limited to that claimed in that demand;
- 284 (4) either that the debt is for a liquidated sum payable immediately, and the debtor appears to be unable to pay it, or that the debt is for a liquidated sum payable at some certain, future time, that time to be specified, and the debtor appears to have no reasonable prospect of being able to pay it, and, in either case<sup>4</sup>, that the debt is unsecured<sup>5</sup>.

Where the debt is one for which<sup>6</sup> a statutory demand must have been served on the debtor:

- 285 (a) there must be specified the date and manner of service of the statutory demand; and
- 286 (b) it must be stated that, to the best of the creditor's knowledge and belief, the demand has been neither complied with nor set aside<sup>7</sup>, and no application to set it aside is outstanding<sup>8</sup>.

If the case is one where the debt arises under a judgment or order of the court and execution has been returned unsatisfied<sup>9</sup>, the court from which the execution or other process issued must be specified, and particulars must be given relating to the return<sup>10</sup>.

1 For the meaning of 'the debt' see para 160 note 7 ante.

2 The failure to state the consideration for a debt in the petition will not by itself invalidate the petition: *Re Blackman (a debtor)* [1999] BCC 446.

3 As to statutory demands see para 154 et seq ante.

4 I.e. subject to the Insolvency Act 1986 s 269: see para 126 ante.

5 Insolvency Rules 1986, SI 1986/1925, r 6.8(1) (amended by SI 1987/1919). See also para 161 note 7 head (4) ante.

6 I.e. under the Insolvency Act 1986 s 268: see para 127 ante.

7 I.e. in accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended): see paras 157, 158 ante.

8 Ibid r 6.8(2). A petition is not automatically or necessarily invalidated by a failure to state that no application to set aside the statutory demand is outstanding: *Re A Debtor (No 22 of 1993)* [1994] 2 All ER 105, [1994] 1 WLR 46.

9 I.e. under the Insolvency Act 1986 s 268(1)(b): see para 127 head (2) ante.

10 Insolvency Rules 1986, SI 1986/1925, r 6.8(3).

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### ***C. PRESENTATION AND FILING***

#### **163. Presentation and filing.**

The petition, verified by affidavit<sup>1</sup>, must be filed in court<sup>2</sup>; and no petition may be filed unless there is produced with it a receipt for the deposit payable on presentation<sup>3</sup>.

The following copies of the petition must also be delivered to the court with the petition:

- 287 (1) one for service on the debtor;
- 288 (2) one to be exhibited to the affidavit verifying that service; and
- 289 (3) if there is in force for the debtor a voluntary arrangement under Part VIII of the Insolvency Act 1986<sup>4</sup>, and the petitioner is not the supervisor<sup>5</sup> of the arrangement, one copy for him<sup>6</sup>.

Each of these copies must have applied to it the seal of the court, and must be issued to the petitioner<sup>6</sup>. The date and time of filing must be indorsed on the petition and on any copy so issued<sup>7</sup>.

The court must fix a venue<sup>8</sup> for hearing the petition, and this also must be indorsed on the petition and on any copy so issued<sup>9</sup>.

Where a petition contains a request for the appointment of a former supervisor as trustee<sup>10</sup>, the person whose appointment is sought must, not less than two days before the day appointed for hearing the petition, file in court a report including particulars of:

- 290 (a) a date on which he gave written notification to creditors bound by the arrangement of the intention to seek his appointment as trustee, such date to be at least ten days before the day on which the report under this provision is filed; and
- 291 (b) details of any response from creditors to that notice, including any objections to his appointment<sup>11</sup>.

1 le in accordance with the Insolvency Rules 1986, SI 1986/1925, r 6.12(1): see para 165 post. For the prescribed form of affidavit see rr 6.12, 12.7(1), (2), Sch 4, Form 6.13. As to the use of witness statements instead of affidavits in insolvency proceedings see r 7.57(5), (6) (as substituted); and para 793 post.

2 Ibid r 6.10(1). For the meaning of 'file in court' see para 95 note 10 ante.

3 Ibid r 6.10(2). As to the deposit payable on presentation of the petition see para 164 post.

4 le under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.

5 As to the supervisor of a voluntary arrangement see para 108 et seq ante.

- 6 Insolvency Rules 1986, SI 1986/1925, r 6.10(3) (amended by SI 1987/1919).
- 7 Insolvency Rules 1986, SI 1986/1925, r 6.10(4).
- 8 For the meaning of 'venue' see para 84 note 21 ante.
- 9 Insolvency Rules 1986, SI 1986/1925, r 6.10(5).
- 10 le under the Insolvency Act 1986 s 297(5): see para 322 post.
- 11 Insolvency Rules 1986, SI 1986/1925, r 6.10(6) (added by SI 1987/1919).

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **163 Presentation and filing**

NOTE 3--SI 1986/1925 r 6.10(2) now r 6.10(2), (2A), (2B): SI 2004/584.

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### **164. Deposit payable on presentation of petition.**

Before a bankruptcy petition can be presented, the appropriate deposit<sup>1</sup> must be paid to the court in which the petition is to be presented<sup>2</sup>. Such deposit is security:

- 292 (1) for the fee<sup>3</sup> chargeable by the official receiver in respect of his general duties as official receiver on the making of the bankruptcy order<sup>4</sup>; or
- 293 (2) where an insolvency practitioner is appointed to prepare and submit a report to the court<sup>5</sup>, for the payment of his fee<sup>6</sup>.

The court must, except in a case falling within head (2) above, transmit the deposit paid to the official receiver attached to the court<sup>7</sup>. The deposit is to be repaid to the person who made it:

- 294 (a) where the bankruptcy petition is dismissed or withdrawn<sup>8</sup>, in full, unless a bankruptcy order has been made or a fee has become payable<sup>9</sup> to an insolvency practitioner for the preparation and submission of a report to the court;
- 295 (b) if the bankrupt's estate is sufficient to pay the whole or part of the above fee, to the extent that it is not required for the payment of that fee<sup>10</sup>; and
- 296 (c) where a bankruptcy order is annulled<sup>11</sup>, rescinded or recalled, to the extent that it is not required for the payment of the above fee<sup>12</sup>.

1 The appropriate deposit is: (1) in relation to a bankruptcy petition presented under the Insolvency Act 1986 s 264(1)(b) (see para 124 head (2) ante), £250; and (2) in relation to a bankruptcy petition presented under s 264(1)(a), (c) or (d) (see para 124 heads (1), (3) or (4) ante), £300: Insolvency Fees Order 1986, SI



1986/2030, arts 7, 9(b), (c) (amended by SI 1994/2541). See also para 161 note 7 head (8) ante. As to the prospective repeal of the Insolvency Act 1986 s 264(1)(d) see para 844 note 2 post.

2 Insolvency Fees Order 1986, SI 1986/2030, arts 7, 8(1). As to the appropriate court see para 160 ante (creditor's petition) and para 188 post (debtor's petition). An impecunious debtor, unable to afford the deposit, is not unfairly barred from the statutory bankruptcy scheme to which there is no constitutional right of access: *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, [1999] 4 All ER 583, CA.

3 Ie the Insolvency Fees Order 1986, SI 1986/2030, art 8(2)(a), Schedule Pt II, Fee No 2, or where an insolvency practitioner is appointed under the Insolvency Act 1986 s 273 (see paras 200-202 post), the fee payable under the Insolvency Fees Order 1986, SI 1986/2030, art 12 (amended by SI 1994/2541). Where the court appoints an insolvency practitioner under the Insolvency Act 1986 s 273(2) to prepare and submit a report under s 274, the court must, on submission of that report, pay to the practitioner a fee of £250, that sum being inclusive of value added tax: Insolvency Fees Order 1986, SI 1986/2030, art 12 (as so amended). As to insolvency practitioners and their qualification see para 42 et seq ante.

4 As to bankruptcy orders see para 195 et seq post.

5 Ie under the Insolvency Act 1986 s 273.

6 Insolvency Fees Order 1986, SI 1986/2030, art 8(2). As to the official receiver's duties on the making of a bankruptcy order see para 256 et seq post.

7 Ibid art 10. As to official receivers see para 31 et seq ante.

8 As to the withdrawal of a bankruptcy petition see para 184 post.

9 Ie under the Insolvency Fees Order 1986, SI 1986/2030, art 12 (as amended): see note 3 supra.

10 As to the prescribed order of priority of payment of costs etc of the bankruptcy, including the deposit, see para 576 post.

11 As to annulment of bankruptcy orders see para 610 et seq post.

12 Insolvency Fees Order 1986, SI 1986/2030, art 11(1)-(4).

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 164 Deposit payable on presentation of petition

TEXT AND NOTES--Replaced. See now the Insolvency Proceedings (Fees) Order 2004, SI 2004/593, arts 5, 6, Sch 2 (art 5 amended by SI 2007/521, SI 2008/714, SI 2009/645, art 6, Sch 2 amended by SI 2005/544, SI 2006/561, SI 2007/521, SI 2008/714, SI 2009/645).

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### 165. Verification of petition.

The petition must be verified by affidavit<sup>1</sup> that the statements in the petition are true, or are true to the best of the deponent's knowledge, information and belief<sup>2</sup>; and, if the petition is in respect of debts<sup>3</sup> to different creditors, the debts to each creditor must be separately verified<sup>4</sup>. The petition must be exhibited to the affidavit verifying it<sup>5</sup>.

The affidavit must be made:

- 297 (1) by the petitioner, or, if there are two or more petitioners, any one of them; or
- 298 (2) by some person such as a director, company secretary or similar company officer, or a solicitor, who has been concerned in the matters giving rise to the presentation of the petition; or
- 299 (3) by some responsible person who is duly authorised to make the affidavit and has the requisite knowledge of those matters<sup>6</sup>.

Where the maker of the affidavit is not the petitioner himself, or one of the petitioners, he must in the affidavit identify himself and state the capacity in which, and the authority by which, he makes it, and the means of his knowledge of the matters sworn to in the affidavit<sup>7</sup>.

The affidavit is prima facie evidence of the truth of the statements in the petition to which it relates<sup>8</sup>.

If the petition is based on a statutory demand<sup>9</sup>, and more than four months have elapsed between the service of the demand and the presentation of the petition, the affidavit must also state the reasons for the delay<sup>10</sup>.

1 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

2 Ibid r 6.12(1). For the prescribed form of affidavit see rr 6.12, 12.7(1), (2), Sch 4, Form 6.13.

3 For the meaning of 'the debt' see para 160 note 7 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.12(2).

5 Ibid r 6.12(3).

6 Ibid r 6.12(4).

7 Ibid r 6.12(5).

8 Ibid r 6.12(6).

9 As to statutory demands see para 154 et seq ante.

10 Insolvency Rules 1986, SI 1986/1925, r 6.12(7).

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

BANKRUPTCY PETITION/(i) Creditor's Petition/C. PRESENTATION AND FILING/166. Proof of service of statutory demand.

### **166. Proof of service of statutory demand.**

Where<sup>1</sup> the petition must have been preceded by a statutory demand, there must be filed in court<sup>2</sup>, with the petition, an affidavit or affidavits<sup>3</sup> proving service of the demand; and every affidavit must have exhibited to it a copy of the demand as served<sup>4</sup>.

If the demand has been served personally on the debtor, the affidavit must be made by the person who effected that service<sup>5</sup>. If service of the demand, however effected, has been acknowledged in writing either by the debtor himself, or by some person stating himself in the acknowledgment to be authorised to accept service on the debtor's behalf, the affidavit must be made either by the creditor or by a person acting on his behalf, and the acknowledgment of service must be exhibited to the affidavit<sup>6</sup>. If neither of the above provisions applies, the affidavit or affidavits must be made by a person or persons having direct personal knowledge of the means adopted for serving the statutory demand, and must:

- 300 (1) give particulars of the steps which have been taken<sup>7</sup> with a view to serving the demand personally; and
- 301 (2) state the means whereby, those steps having been ineffective, it was sought to bring the demand to the debtor's attention; and
- 302 (3) specify a date<sup>8</sup> by which, to the best of the knowledge, information and belief of the person making the affidavit, the demand will have come to the debtor's attention<sup>9</sup>.

Where the creditor has taken advantage of the statutory provisions allowing advertisement of the demand in a newspaper<sup>10</sup>, the affidavit must be made either by the creditor himself or by a person having direct personal knowledge of the circumstances; and there must be specified in the affidavit the means of the creditor's knowledge or, as the case may be, belief so required, and the date or dates on which, and the newspaper in which, the statutory demand was so advertised<sup>11</sup>. There must be exhibited to the affidavit a copy of any advertisement of the statutory demand<sup>12</sup>.

The court may decline to file the petition if not satisfied that the creditor has discharged the obligation imposed on him by the statutory requirements as to service<sup>13</sup>.

1    le under the Insolvency Act 1986 s 268: see para 127 ante.

2    For the meaning of 'file in court' see para 95 note 10 ante.

3    As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post. See also *Practice Direction-Insolvency Proceedings* para 13.4.

4    Insolvency Rules 1986, SI 1986/1925, r 6.11(1), (2) (amended by SI 1987/1919).

5    Insolvency Rules 1986, SI 1986/1925, r 6.11(3). For the prescribed form of affidavit see rr 6.11, 12.7(1), (2), Sch 4, Form 6.11 (substituted by SI 1987/1919). The Insolvency Rules 1986, SI 1986/1925, Sch 4, Form 6.11 (as so substituted) should only be used where the demand has been served personally and acknowledged in writing; if the demand has not been acknowledged in writing, the affidavit should be made by the process server and Sch 4, Form 6.11 paras 2, 3 (as so substituted) should be omitted: *Practice Direction-Insolvency Proceedings* para 13.2.

6    Insolvency Rules 1986, SI 1986/1925, r 6.11(4).

7 The steps of which particulars are given for the purposes of *ibid* r 6.11(5)(a) must be such as would have sufficed to justify an order for substituted service of a petition: r 6.11(6). As to substituted service see para 171 post.

8 If the affidavit specifies a date for the purposes of compliance with *ibid* r 6.11(5)(c), then, unless the court otherwise orders, that date is deemed for the purposes of the Insolvency Rules 1986, SI 1986/1925 (as amended) to have been the date on which the statutory demand was served on the debtor: r 6.11(7).

9 *Ibid* r 6.11(5). For the prescribed form of affidavit see rr 6.11, 12.7(1), (2), Sch 4, Form 6.12. As to the use of Sch 4, Form 6.12 see *Practice Direction-Insolvency Proceedings* para 13.3.

10 *Ie* under the Insolvency Rules 1986, SI 1986/1925, r 6.3(3): see para 156 ante.

11 *Ibid* r 6.11(8). See also para 161 note 7 head (5) ante.

12 *Ie* *ibid* r 6.3(2): see para 156 ante.

13 *Ibid* r 6.11(9). This a matter for the judge to decide on the facts of each case, although the test of the steps required to be taken by a petitioning creditor is a high one: *Regional Collection Services Ltd v Heald* [2000] BPIR 661, CA.

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 166 Proof of service of statutory demand

TEXT AND NOTES--For the purposes of a demand made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 372(4)(a) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 501), SI 1986/1925 r 6.11 applies as if references to the debtor were references to an individual, and references to the creditor were references to the Financial Services Authority: Bankruptcy (Financial Services and Markets Act 2000) Rules 2001, SI 2001/3634, r 6(1). For the meaning of 'individual' for these purposes see PARA 154.

NOTE 9--SI 1986/1925 Sch 4, Form 6.12 amended: SI 2009/642.

TEXT AND NOTES 10-12--SI 1986/1925 r 6.11(8) amended: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/C. PRESENTATION AND FILING/167. Notice to the Chief Land Registrar.

### 167. Notice to the Chief Land Registrar.

When the petition is filed, the court must forthwith send to the Chief Land Registrar notice of the petition together with a request that it may be registered in the register of pending actions<sup>1</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1919, r 6.13. For the prescribed form of application for registration see rr 6.13, 12.7(1), (2), Sch 4, Form 6.14 (substituted by SI 1987/1919).

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 167 Notice to the Chief Land Registrar

NOTE 1--Where a court fails to send notice of a bankruptcy petition a trustee in bankruptcy can bring a claim for damages: *Trustee in Bankruptcy of St John Poulton v Ministry of Justice* [2009] EWHC 2123 (Ch), [2009] BPIR 1512, [2009] All ER (D) 128 (Sep).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/C. PRESENTATION AND FILING/168. Security for costs.

### 168. Security for costs.

Where the debt<sup>1</sup> in respect of which the petition is presented is for a liquidated sum payable at some future time<sup>2</sup>, it being claimed in the petition that the debtor appears to have no reasonable prospect of being able to pay it, the petitioning creditor may, on the debtor's application, be ordered to give security for the debtor's costs<sup>3</sup>. The nature and amount of the security to be ordered is in the court's discretion<sup>4</sup>; and, if an order is so made, there may be no hearing of the petition until the whole amount of the security has been given<sup>5</sup>.

1 For the meaning of 'the debt' see para 160 note 7 ante.

2 I.e. under the Insolvency Act 1986 s 268(2): see para 127 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.17(1), (2). The general rules relating to security for costs (see CPR 25.12, 25.13; and CIVIL PROCEDURE vol 11 (2009) PARAS 745, 746) also apply: see the Insolvency Rules 1986, SI 1986/1925, r 7.51(1) (as substituted); and para 756 post.

4 Ibid r 6.17(3). A solicitor's undertaking may be accepted by way of security for costs in lieu of a bond: *A Ltd v B Ltd* [1996] 1 WLR 665.

5 Insolvency Rules 1986, SI 1986/1925, r 6.17(4).

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/C. PRESENTATION AND FILING/169. Amendment of petition.

### **169. Amendment of petition.**

With the permission of the court, given on such terms, if any, as the court thinks fit to impose, the petition may be amended at any time after presentation by the omission of any creditor or debt<sup>1</sup>.

- 1 Insolventcy Rules 1986, SI 1986/1925, r 6.22. For the meaning of 'the debt' see para 160 note 7 ante.

#### **UPDATE**

#### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/C. PRESENTATION AND FILING/170. Consolidation of petitions.

### **170. Consolidation of petitions.**

Where two or more bankruptcy petitions are presented against the same debtor, the court may order the consolidation of the proceedings, on such terms as it thinks fit<sup>1</sup>.

- 1 Insolventcy Rules 1986, SI 1986/1925, r 6.236.

#### **UPDATE**

#### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/D. SERVICE OF THE PETITION/171. Service of the petition.

## **D. SERVICE OF THE PETITION**

### **171. Service of the petition.**

The petition must be served personally on the debtor by an officer of the court, or by the petitioning creditor or his solicitor<sup>1</sup>, or by a person instructed by the creditor or his solicitor for the purpose; and service must be effected by delivering to him a sealed copy of the petition<sup>2</sup>. If the court is satisfied by affidavit<sup>3</sup> or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or other legal process, or for any other cause, it may order substituted service to be effected in such manner as it thinks fit<sup>4</sup>. Where an order for substituted service has been carried out, the petition is deemed duly served on the debtor<sup>5</sup>. If to the petitioner's knowledge there is in force for the debtor a voluntary arrangement under Part VIII of the Insolvency Act 1986<sup>6</sup>, and the petitioner is not himself the supervisor of the arrangement, a copy of the petition must be sent by him to the supervisor<sup>7</sup>.

1 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

2 Insolvency Rules 1986, SI 1986/1925, r 6.14(1).

3 As to the use of witness statements instead of affidavits in insolvency proceedings see *ibid* r 7.57(5), (6) (as substituted); and para 793 post.

4 *Ibid* r 6.14(2). In most cases, evidence of the following steps will suffice to justify an order for substituted service:

46 (1) one personal call at the residence and place of business of the debtor where both are known or at either of such places as is known; where it is known that the debtor has more than one residential or business address, personal calls should be made at all the addresses;

47 (2) should the creditor fail to effect service, a first-class prepaid letter should be written to the debtor referring to the call(s), the purpose of the same and the failure to meet with the debtor, adding that a further call will be made for the same purpose at a specified time, date and place; at least two business days' notice should be given of the appointment and copies of the letter sent to all known addresses of the debtor; the appointment letter should also state that:

26. (a) in the event of the time and place not being convenient, the debtor is to name such other time and place reasonably convenient for the purpose;

26

27. (b) if the debtor fails to keep the appointment, application will be made to the court for an order for substituted service either by advertisement, or in such manner as the court may think fit;

27

48 (3) in attending any appointment made by letter, inquiry should be made as to whether the debtor has received all letters left for him; if the debtor is away, inquiry should also be made as to whether or not letters are being forwarded to an address within the jurisdiction (England and Wales) or elsewhere;

49 (4) if the debtor is represented by a solicitor, an attempt should be made to arrange an appointment for personal service through such solicitor;

50 (5) the written evidence filed pursuant to the Insolvency Rules 1986, SI 1986/1925, r 6.11 (see para 166 ante) should deal with all the above matters including all relevant facts as to the debtor's whereabouts and whether the appointment letter(s) have been returned:

*Practice Direction-Insolvency Proceedings* para 11.4.

5 Insolvency Rules 1986, SI 1986/1925, r 6.14(3). Where the court makes an order for service by first-class ordinary post, the order will normally provide that service be deemed to be effected on the seventh day after posting: *Practice Direction-Insolvency Proceedings* para 11.5. For the prescribed forms of order for substituted

service and notice in the Gazette see the Insolvency Rules 1986, SI 1986/1925, rr 6.14, 12.7(1), (2), Sch 4, Forms 6.15, 6.16 respectively. In the Insolvency Rules 1986, SI 1986/1925 (as amended) 'the Gazette' means the London Gazette: rr 13.1, 13.13(4).

6 le under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.

7 Insolvency Rules 1986, SI 1986/1925, r 6.14(4) (added by SI 1987/1919).

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **171 Service of the petition**

NOTE 1--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

NOTE 5--SI 1986/1925 Sch 4 Form 6.15 amended: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/D. SERVICE OF THE PETITION/172. Proof of service.

#### **172. Proof of service.**

Service of the petition must be proved by affidavit<sup>1</sup>; and the affidavit must have exhibited to it:

- 303 (1) a sealed copy of the petition; and
- 304 (2) if substituted service has been ordered, a sealed copy of the order;

and it must be filed in court<sup>2</sup> immediately after service<sup>3</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.15(1). As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

<sup>2</sup> For the meaning of 'file in court' see para 95 note 10 ante.

<sup>3</sup> Insolvency Rules 1986, SI 1986/1925, r 6.15(2). For the prescribed forms of affidavit see rr 6.15, 12.7(1), (2), Sch 4, Form 6.17 (affidavit of personal service), Form 6.18 (affidavit of substituted service). In circumstances where the debtor is not present before the court, the court will not usually waive the absence of an affidavit of service and make a bankruptcy order: *Re Awan* [2000] BPIR 241.

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**



The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **172 Proof of service**

TEXT AND NOTES--SI 1986/1925 r 6.15 substituted by r 6.15A: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/D. SERVICE OF THE PETITION/173. Death of debtor before service.

## **173. Death of debtor before service.**

If the debtor dies before service of the petition, the court may order service to be effected on his personal representatives, or on such other persons as it thinks fit<sup>1</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.16.

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/E. HEARING OF THE PETITION/174. Date of hearing.

## ***E. HEARING OF THE PETITION***

### **174. Date of hearing.**

The petition may not be heard until at least 14 days have elapsed since it was served on the debtor<sup>1</sup>. The court may, however, on such terms as it thinks fit, hear the petition at an earlier date, if it appears that the debtor has absconded, or the court is satisfied that it is a proper case for an expedited hearing, or the debtor consents to a hearing within the 14 days<sup>2</sup>.

Any of the following may appear and be heard, that is to say, the petitioning creditor, the debtor, the supervisor of any voluntary arrangement under Part VIII of the Insolvency Act 1986<sup>3</sup> in force for the debtor and any creditor who has given notice<sup>4</sup> of his intention to appear<sup>5</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.18(1). As to service of the bankruptcy petition see paras 171-173 ante.

- 2 Ibid r 6.18(2).
- 3 le under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.
- 4 le under the Insolvency Rules 1986, SI 1986/1925, r 6.23: see para 177 post.
- 5 Ibid r 6.18(3) (amended by SI 1987/1919).

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/E. HEARING OF THE PETITION/175. Petition by moneylender.

### 175. Petition by moneylender.

A petition in respect of a moneylending transaction made before 27 January 1980<sup>1</sup> of a creditor who at the time of the transaction was a licensed moneylender<sup>2</sup> must at the hearing be supported by an affidavit<sup>3</sup> incorporating a statement setting out in detail the particulars mentioned<sup>4</sup> in the Moneylenders Act 1927<sup>5</sup>.

1 le the date on which the Moneylenders Act 1927 s 9 was repealed: see the Consumer Credit Act 1974 s 192(3)(b), (4), Sch 5; the Consumer Credit Act 1974 (Commencement No 5) Order 1979, SI 1979/1685, art 2(2), Schedule Pt II.

2 le a moneylender licensed under the Moneylenders Act 1927 s 1 (repealed).

3 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

4 le the particulars in the Moneylenders Act 1927 s 9(2) (repealed). Such details are: (1) the amount of the sums actually lent to the debtor and the dates on which they were lent, and the amount of every payment already received by the moneylender in respect of the loan and the date on which every such payment was made; (2) the amount of the balance which remains unpaid distinguishing the amount of the principal from the amount of interest included therein, the appropriation between principal and interest being made in accordance with the provisions of the Moneylenders Act 1927 where the interest is not expressed by the contract for the loan in terms of a rate; and (3) where the amount of interest included in the unpaid balance represents a rate per cent per annum exceeding 5%, the amount of interest which would be so included if it were calculated at the rate of 5% per annum: s 9(2)(a)-(c) (repealed).

5 Insolvency Rules 1986, SI 1986/1925, r 6.20.

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **175 Petition by moneylender**

TEXT AND NOTES--SI 1986/1925 r 6.20 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/E. HEARING OF THE PETITION/176. Petition opposed by debtor.

### **176. Petition opposed by debtor.**

Where the debtor intends to oppose the petition, he must, not later than seven days before the day fixed for the hearing, file in court<sup>1</sup> a notice specifying the grounds on which he will object to the making of a bankruptcy order and send a copy of the notice to the petitioning creditor or his solicitor<sup>2</sup>.

<sup>1</sup> For the meaning of 'file in court' see para 95 note 10 ante.

<sup>2</sup> Insolvency Rules 1986, SI 1986/1925, r 6.21. For the prescribed form of notice of intention to oppose see rr 6.21, 12.7(1), (2), Sch 4, Form 6.19. For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **176 Petition opposed by debtor**

NOTE 2--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/E. HEARING OF THE PETITION/177. Notice by persons intending to appear.

### **177. Notice by persons intending to appear.**

Every creditor who intends to appear on the hearing of the petition must give to the petitioning creditor notice of his intention to do so<sup>1</sup>. The notice must specify:

- 305 (1) the name and address of the person giving it, and any telephone number and reference which may be required for communication with him or with any other person, to be also specified in the notice, authorised to speak or act on his behalf;  
 306 (2) whether his intention is to support or oppose the petition; and  
 307 (3) the amount and nature of his debt<sup>2</sup>.

The notice must be sent so as to reach the addressee not later than 16.00 hours on the business day<sup>3</sup> before that which is appointed for the hearing, or, where the hearing has been adjourned, for the adjourned hearing<sup>4</sup>.

A person failing to comply with the above provisions may appear on the hearing of the petition only with the permission of the court<sup>5</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.23(1). For the prescribed form of notice of intention to appear see rr 6.23, 12.7(1), (2), Sch 4, Form 6.20. As to the petitioning creditor's duty to prepare for the court a list of the creditors who have given notice under r 6.23 see para 178 post.

2 Ibid r 6.23(2). For the meaning of 'the debt' see para 160 note 7 ante.

3 For the meaning of 'business day' see para 95 note 11 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.23(3).

5 Ibid r 6.23(4).

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/E. HEARING OF THE PETITION/178. List of appearances.

### **178. List of appearances.**

The petitioning creditor must prepare for the court a list of the creditors, if any, who have given notice of their intention to appear<sup>1</sup>, specifying their names and addresses and, if known to him, their respective solicitors<sup>2</sup>. Against the name of each creditor in the list it must be stated whether his intention is to support the petition, or to oppose it<sup>3</sup>. On the day appointed for the hearing of the petition, a copy of the list must be handed to the court before the commencement of the hearing<sup>4</sup>; and, if any creditor is given permission to appear<sup>5</sup>, the petitioner must add to the list the same particulars in respect of the person to whom permission has been given<sup>6</sup>.

1 ie under the Insolvency Rules 1986, SI 1986/1925, r 6.23: see para 177 ante.

2 Ibid r 6.24(1). For the prescribed form of list see rr 6.24, 12.7(1), (2), Sch 4, Form 6.21. For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

3 Insolvency Rules 1986, SI 1986/1925, r 6.24(2).

4 Ibid r 6.24(3).

5 le under ibid r 6.23(4): see para 177 ante.

6 Ibid r 6.24(4).

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **178 List of appearances**

NOTE 2--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/E. HEARING OF THE PETITION/179. Non-appearance of creditor.

### **179. Non-appearance of creditor.**

If the petitioning creditor fails to appear on the hearing of the petition, no subsequent petition against the same debtor, either alone or jointly with any other person, may be presented by the same creditor in respect of the same debt, without the permission of the court to which the previous petition was presented<sup>1</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.26. As to the principles to be applied in considering the exercise of the discretion given by r 6.26 see *Omgate Ltd v Gordon* [2001] BPIR 909.

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON

BANKRUPTCY PETITION/(i) Creditor's Petition/E. HEARING OF THE PETITION/180. Extension of time for hearing.

### **180. Extension of time for hearing.**

The petitioning creditor may, if the petition has not been served, apply to the court to appoint another venue<sup>1</sup> for the hearing; and the application must state the reasons why the petition has not been served<sup>2</sup>. No costs occasioned by the application may be allowed in the proceedings except by order of the court<sup>3</sup>. If the court appoints another day for the hearing, the petitioning creditor must forthwith notify any creditor who has given notice<sup>4</sup> of his intention to appear<sup>5</sup>.

1 For the meaning of 'venue' see para 84 note 21 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.28(1), (2). All applications for an extension should include a statement of the date fixed for the hearing of the petition: *Practice Direction-Insolvency Proceedings* para 14.2. The petitioning creditor should attend, by solicitors or in person, on or before the hearing date to ascertain whether the application has reached the file and been dealt with; and it should not be assumed that an extension will be granted: para 14.3.

Late applications for extension of hearing dates, and failure to attend on the listed hearing of a petition, will be dealt with as follows:

- 51 (1) if an application is submitted less than two clear working days before the hearing date (eg later than Monday for Thursday, or Wednesday for Monday), the costs of the application will not be allowed under the Insolvency Rules 1986, SI 1986/1925, r 6.28(3);
- 52 (2) if the petition has not been served and no extension has been granted by the time fixed for the hearing of the petition, and if no one attends for the hearing, the petition will be relisted for a hearing about 21 days later; the court will notify the petitioning creditor's solicitors (or the petitioning creditor in person) and any known supporting or opposing creditors or their solicitors of the new date and times; written evidence should then be filed on behalf of the petitioning creditor explaining fully the reasons for the failure to apply for an extension or to appear at the hearing, and (if appropriate) giving reasons why the petition should not be dismissed;
- 53 (3) on the relisted hearing the court may dismiss the petition if not satisfied it should be adjourned or a further extension granted:

*Practice Direction-Insolvency Proceedings* para 14.1.

3 Insolvency Rules 1986, SI 1986/1925, r 6.28(3).

4 *Ibid* r 6.23: see para 177 ante.

5 *Ibid* r 6.28(4).

### **UPDATE**

#### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(7) PROCEDURE ON BANKRUPTCY PETITION/(i) Creditor's Petition/E. HEARING OF THE PETITION/181. Adjournment.

### **181. Adjournment.**

If the court adjourns<sup>1</sup> the hearing of the petition, then, unless the court otherwise directs, the petitioning creditor must forthwith send to the debtor and, where any creditor has given notice of his intention to appear<sup>2</sup> but was not present at the hearing, to him, notice of the making of the order of adjournment; and the notice must state the venue<sup>3</sup> for the adjourned hearing<sup>4</sup>.

1 The granting of an adjournment is a matter for the discretion of the court. However, the general principle is that a petitioning creditor is entitled to be paid his debt in full on the hearing of the petition unless there is a reasonable prospect of his being paid within a short period of time: *Re Gilmartin (a bankrupt), ex p Bankrupt v International Agency and Supply Ltd* [1989] 2 All ER 835, sub nom *Re Gilmartin (a bankrupt)* [1989] 1 WLR 513. Thus, on the hearing of a petition, the court should not grant repeated adjournments as a matter of course: *Re Heyl, ex p DP Morgan Ltd* [1918] 1 KB 452, CA. In particular, the practice of granting repeated adjournments of the petition to enable the debtor to repay his debts by instalments but where there is no prospect of payment in full within a reasonable time has been disapproved by the courts: *Re A Debtor (No 26 of 1983)*, *Re A Debtor (No 72 of 1982)* [1984] 2 All ER 257, sub nom *Re A Debtor (No 72 of 1982)*, *ex p Mumford Leasing Ltd v Debtor*, *Re A Debtor (No 26 of 1983)*, *ex p Drygrass Ltd v Debtor* [1984] 1 WLR 1143, DC; *Judd v Williams* [1998] BPIR 88.

2 Ie under the Insolvency Rules 1986, SI 1986/1925, r 6.23: see para 177 ante.

3 For the meaning of 'venue' see para 84 note 21 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.29. For the prescribed form of order see rr 6.29, 12.7(1), (2), Sch 4, Form 6.23.

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 182. Substitution of petitioner.

Where a creditor petitions and is subsequently found not entitled to do so, or where the petitioner:

- 308 (1) consents to withdraw his petition or to allow it to be dismissed, or consents to an adjournment, or fails to appear in support of his petition when it is called on in court on the day originally fixed for the hearing, or on a day to which it is adjourned; or
- 309 (2) appears, but does not apply for an order in the terms of the prayer of his petition,

the court may, on such terms as it thinks just, order that there be substituted as petitioner any creditor who:

- 310 (a) has given notice<sup>1</sup> of his intention to appear at the hearing;

- 311 (b) is desirous of prosecuting the petition; and  
 312 (c) was, at the date on which the petition was presented, in such a position in relation to the debtor as would have enabled him, the creditor, on that date to present a bankruptcy petition in respect of a debt<sup>2</sup> or debts owed to him by the debtor, the statutory provisions<sup>3</sup> being satisfied in respect of that debt or those debts<sup>4</sup>.

1 le under the Insolvency Rules 1986, SI 1986/1925, r 6.23: see para 177 ante.

2 For the meaning of 'the debt' see para 160 note 7 ante.

3 le the Insolvency Act 1986 s 267(2)(a)-(d): see para 126 heads (1)-(4) ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.30(1), (2). For the prescribed form of order for the substitution of the petitioner on a creditor's petition see rr 6.30, 12.7(1), (2), Sch 4, Form 6.24A (added by SI 1987/1919).

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 182 Substitution of petitioner

NOTE 4--SI 1986/1925 Sch 4 Form 6.24A substituted: SI 2005/527.

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### 183. Change of carriage of petition.

On the hearing of the petition, any person who claims to be a creditor of the debtor, and who has given notice<sup>1</sup> of his intention to appear at the hearing, may apply to the court for an order giving him carriage of the petition in place of the petitioning creditor, but without requiring any amendment of the petition<sup>2</sup>.

The court may, on such terms as it thinks just, make a change of carriage order if satisfied that:

- 313 (1) the applicant is an unpaid and unsecured creditor<sup>3</sup> of the debtor; and  
 314 (2) the petitioning creditor either intends by any means to secure the postponement, adjournment or withdrawal of the petition, or does not intend to prosecute the petition, either diligently or at all<sup>4</sup>.

The court must not make the order if satisfied that the petitioning creditor's debt<sup>5</sup> has been paid, secured or compounded for by means of:

- 315 (a) a disposition of property made by some person other than the debtor; or



316 (b) a disposition of the debtor's own property made with the approval of, or ratified by, the court<sup>6</sup>.

A change of carriage order may be made whether or not the petitioning creditor appears at the hearing; and, if the order is made, the person given the carriage of the petition is entitled to rely on all evidence previously adduced in the proceedings, whether by affidavit<sup>7</sup> or otherwise<sup>8</sup>.

1 le under the Insolvency Rules 1986, SI 1986/1925, r 6.23: see para 177 ante.

2 Ibid r 6.31(1).

3 As to secured creditors see para 560 et seq post.

4 Insolvency Rules 1986, SI 1986/1925, r 6.31(2). For the prescribed form of change of carriage order see rr 6.31, 12.7(1), (2), Sch 4, Form 6.24B (added by SI 1987/1919).

5 For the meaning of 'the debt' see para 160 note 7 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 6.31(3). Any such payment must be unconditional in the sense that it is not liable to be avoided under the provisions of the Insolvency Act 1986 in the event that a bankruptcy order is made: *Smith (a bankrupt) v Ian Simpson & Co (a firm)* [2001] 1 Ch 239, [2000] 3 All ER 434, CA; and see para 195 post. As to the power of the court to approve or ratify a disposition of the debtor's own property see the Insolvency Act 1986 s 284; and para 217 post.

7 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

8 Ibid r 6.31(4), (5).

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 184. Petitioner seeking dismissal or permission to withdraw.

Where the petitioner applies to the court for the petition to be dismissed, or for permission to withdraw it, he must, unless the court otherwise orders, file in court<sup>1</sup> an affidavit<sup>2</sup> specifying the grounds of the application and the circumstances in which it is made<sup>3</sup>. If, since the petition was filed, any payment has been made to the petitioner by way of settlement, in whole or in part, of the debt or debts in respect of which the petition was brought, or any arrangement has been entered into for securing or compounding it or them, the affidavit must state:

317 (1) what dispositions of property have been made for the purposes of the settlement or arrangement; and

318 (2) whether, in the case of any disposition, it was property of the debtor himself, or of some other person; and

319 (3) whether, if it was property of the debtor, the disposition was made with the approval of, or has been ratified by, the court, and if so, specifying the relevant court order<sup>4</sup>.

No order giving permission to withdraw a petition may be given before the petition is heard<sup>5</sup>.

1 For the meaning of 'file in court' see para 95 note 10 ante.

2 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

3 Ibid r 6.32(1). The court will then exercise its judgment on the same as to the propriety of permitting the withdrawal: *Re Bebro* [1900] 2 QB 316, CA.

4 Insolvency Rules 1986, SI 1986/1925, r 6.32(2). Where a petition is withdrawn or dismissed after payment of the petition debt, the petitioning creditor will be entitled to an order for the costs unless defects in his proceedings have unreasonably exposed the debtor to costs: *Re A Debtor (No 510 of 1997)* (1998) Times, 18 June.

5 Insolvency Rules 1986, SI 1986/1925, r 6.32(3). For the prescribed form of order see rr 6.32, 12.7(1), (2), Sch 4, Form 6.22.

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 185. Abuse of process.

A bankruptcy petition may be dismissed where its presentation is an abuse of the process of the court.

Where a petition is founded on a debt to which the petitioning creditor is not properly entitled, it may be dismissed as an abuse of process<sup>1</sup>. This includes the situation where the presentation of a petition amounts to an attempt by the petitioning creditor, through the commencement of bankruptcy proceedings, to obtain the payment of money or other advantages to which he is not properly entitled<sup>2</sup>. Such conduct on the part of the creditor is sometimes termed 'extortion'<sup>3</sup>.

Where a petition debt is genuinely disputed by the debtor, the court may find that the presentation of the petition is an abuse of process<sup>4</sup>.

If a petition is presented by a creditor, not bona fide with the view of obtaining an adjudication, but for some collateral purpose or with a view to putting pressure on the debtor, it may be dismissed as an abuse of the process of the court<sup>5</sup>. However, the mere fact that the petitioning creditor is actuated by a motive other than a desire to obtain a distribution of the debtor's assets in bankruptcy, for example, by a wish to put an end to a partnership with the debtor,

does not constitute an abuse of the process of the court so as to disentitle the petitioning creditor to a bankruptcy order<sup>6</sup>. Where a petition is not presented solely for an ulterior motive and is at least partly for the purpose of seeking to obtain a dividend in the bankruptcy, it will not be treated as an abuse of process of the court<sup>7</sup>.

The purchase of a debt in order to found a bankruptcy petition on it does not necessarily constitute an abuse of process<sup>8</sup>.

1 In relation to the debts in respect of which a petition may be presented see also para 126 ante.

2 *Re Majory, A Debtor, ex p Debtor v FA Dumont Ltd* [1955] Ch 600, sub nom *Re A Debtor (No 757 of 1954), ex p Debtor v FA Dumont Ltd (Petitioning Creditor)* [1955] 2 All ER 65, CA. This will include the situation where a creditor attempts to extort money as a condition of his assent to a transaction carried out by the debtor in order to avoid bankruptcy and afterwards presents a petition founded on the same transaction: *Re Shaw, ex p Gill* (1901) 83 LT 754, CA; *Re A Debtor (No 20 of 1904), ex p Debtor* (1904) 91 LT 664 (affd sub nom *Re Goldberg* (1904) 21 LTR 139, CA). See also *Re G, ex p B* (1900) 44 Sol Jo 345, CA; *Re Brindley, ex p Taylor, Sons & Co* [1906] 1 KB 377, CA; *Re A Debtor (No 883 of 1927)* [1928] Ch 199, CA. In the following cases the petitioner's conduct did not amount to extortion: *Re Bebro* [1900] 2 QB 316, CA; *Re Sunderland* [1911] 2 KB 658, CA; *Re Hay* (1913) 110 LT 47, DC; *Re Wilson, ex p Jones* (1916) 85 LJKB 1408, CA.

3 'Extortion', in relation to bankruptcy proceedings, has no special or artificial significance divorced from the ordinary implication of the word: *Re Majory, A Debtor, ex p Debtor v FA Dumont Ltd* [1955] Ch 600, sub nom *Re A Debtor (No 757 of 1954), ex p Debtor v FA Dumont Ltd (Petitioning Creditor)* [1955] 2 All ER 65, CA. However, because bankruptcy proceedings can be a potent instrument of oppression, the court will always look strictly at the conduct of a creditor who uses or threatens such proceedings, so as to ensure that he has not overstepped the recognised limits: *Re A Judgment Summons (No 25 of 1952), ex p Henlys Ltd* [1953] Ch 195 at 212, [1953] 1 All ER 424 at 432, 433, CA; *Re Majory, A Debtor, ex p Debtor v FA Dumont Ltd* [1955] supra at 622, 77. It is the court's duty to dismiss a petition which is made a means of extorting or attempting to extort money: *Re Atkinson, ex p Atkinson* (1892) 9 Morr 193, CA; *Re Otway, ex p Otway* [1895] 1 QB 812, CA; *Re Bebro* [1900] 2 QB 316, CA.

4 *Re A Judgment Summons (No 25 of 1952), ex p Henlys Ltd* [1953] Ch 1 at 5, [1952] 2 All ER 772 at 774; on appeal [1953] Ch 195 at 201-207, [1953] 1 All ER 424 at 426-430, CA per Jenkins LJ. The Court of Appeal, however, there held that extortion is not a bar to an order under the Debtors Act 1869 s 5 for the committal of the debtor. As to committal orders see para 194 note 4 post.

In relation to statutory demands see para 158 ante; and in relation to proceedings on a creditor's petition see the Insolvency Act 1986 s 271(1) and para 195 post. In relation to the winding up of companies see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 452.

Other circumstances where the presentation of a petition may amount to an abuse of process include where, after dismissal of a petition presented by a creditor, he joins with another creditor in presenting a second petition founded, so far as the first creditor is concerned, on the same debt (*Re Leonard, ex p Yeomans and Heap* (1896) 3 Mans 317, CA); or where the petitioner has refused part of the debt tendered on his invitation so as to keep the debt above the minimum level required for the presentation of a petition (*Re A Debtor (No 883 of 1927)* [1928] Ch 199, CA).

5 *Re Davis, ex p King* (1876) 3 ChD 461, CA; *Re Adams, ex p Griffin* (1879) 12 ChD 480, CA; *Re Baker, ex p Baker* (1887) 5 Morr 5.

6 *King v Henderson* [1898] AC 720, PC.

7 *Re Ross (a bankrupt) (No 2)* [2000] BPIR 636, CA.

8 *Re Baker, ex p Baker* (1887) 5 Morr 5; but see *Re Adams, ex p Griffin* (1879) 12 ChD 480, CA.

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **186. Malice in presenting petition.**

Where a bankruptcy petition has been presented maliciously and without reasonable and probable cause, an action will, it seems, lie against the petitioning creditor, provided that the petition has been dismissed or the adjudication annulled<sup>1</sup>.

<sup>1</sup> *Farley v Danks* (1855) 4 E & B 493; *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329 (cited with approval in *Roy v Prior* [1971] AC 470 at 479, [1970] 2 All ER 729 at 735, HL); *Whitworth v Hall* (1831) 2 B & Ad 695; *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210, HL. In *Beechey v William Hill (Park Lane) Ltd* [1956] CLY 5442, the plaintiff's action failed on the ground that, since the bankruptcy had been annulled on payment of the debts in full, the proceedings had not terminated, vis-à-vis the defendants, in the plaintiff's favour. See further TORT vol 45(2) (Reissue) paras 493-494.

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **186 Malice in presenting petition**

NOTE 1--See *Jacob v Vockrodt* [2007] EWHC 2403 (QB), [2007] BPIR 1568 (petitioner entitled to rely on advice from solicitor advising him to issue formal petition).

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### **187. Vacating registration on dismissal of petition.**

If the petition is dismissed or withdrawn by permission of the court, an order must be made at the same time permitting vacation of the registration of the petition as a pending action; and the court must send to the debtor two sealed copies of the order<sup>1</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.27. For the prescribed form of order see rr 6.27, 12.7(1). (2), Sch 4, Form 6.22. As to the giving of notice of the petition to the Chief Land Registrar see r 6.13; and para 167 ante.

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## **(ii) Debtor's Petition**

### **A. THE APPROPRIATE COURT**

#### **188. Court to which petition to be presented.**

In the following cases, the petition must be presented to the High Court:

- 320 (1) if the debtor has resided<sup>1</sup> or carried on business<sup>2</sup> in the London insolvency district<sup>3</sup> for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period in those six months than in any other insolvency district<sup>4</sup>; or
- 321 (2) if the debtor is not resident in England and Wales<sup>5</sup>.

In any other case, the petition must be presented to the debtor's own county court, which is:

- 322 (a) the county court for the insolvency district in which he has resided or carried on business for the longest period in those six months; or
- 323 (b) if he has for the greater part of those six months carried on business in one insolvency district and resided in another, the county court for that in which he has carried on business; or
- 324 (c) if he has during those six months carried on business in more than one insolvency district, the county court for that in which is, or has been for the longest period in those six months, his principal place of business<sup>6</sup>.

If, in a case not falling within heads (1) and (2) above, it is more expedient for the debtor with a view to expediting his petition:

- 325 (i) it may in any case be presented to whichever court is specified by the Insolvency Rules 1986<sup>7</sup> as being, in relation to the debtor's own court, the nearest full-time court; and
- 326 (ii) it may alternatively, in a case falling within head (b) above, be presented to the court for the insolvency district in which he has resided for the greater part of the six months there referred to<sup>8</sup>.

Notwithstanding any other provision<sup>9</sup>, where there is in force for the debtor a voluntary arrangement under Part VIII of the Insolvency Act 1986<sup>10</sup>, the petition must be presented to the court to which the nominee's report<sup>11</sup> was submitted<sup>12</sup>.

The petition must contain sufficient information to establish that it is brought in the appropriate court<sup>13</sup>.

- 1 For the meaning of 'reside' see para 125 note 4 ante.
- 2 For the meaning of 'carry on business' see para 125 note 5 ante.
- 3 As to the London insolvency district see para 7 note 1 ante.
- 4 As to insolvency districts generally see para 7 ante.
- 5 Insolvency Rules 1986, SI 1986/1925, r 6.40(1). Part 6 Ch 3 (rr 6.37-6.50) (as amended) (see *infra*; and para 189 et seq post) relate to a debtor's petition, and the making of a bankruptcy order thereon: r 6.37. For the prescribed form of bankruptcy petition see rr 6.37, 12.7(1), (2), Sch 4, Form 6.27.
- 6 *Ibid* r 6.40(2). For the meaning of 'place of business' see para 125 note 5 ante.
- 7 *Ie* *ibid* r 6.40(3), Sch 2 (substituted by SI 1987/1919).
- 8 Insolvency Rules 1986, SI 1986/1925, r 6.40(3) (as substituted: see note 7 *supra*).
- 9 *Ie* in *ibid* r 6.40 (amended by SI 1987/1919).
- 10 *Ie* under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.
- 11 *Ie* under *ibid* s 256: see para 95 ante.
- 12 Insolvency Rules 1986, SI 1986/1925, r 6.40(3A) (added by SI 1987/1919).
- 13 Insolvency Rules 1986, SI 1986/1925, r 6.40(4).

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 188 Court to which petition to be presented

TEXT AND NOTES--SI 1986/1925 r 6.40 substituted by r 6.40A: SI 2010/686.

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## ***B. CONTENTS OF PETITION***

### **189. Identification of debtor.**

The petition must state the following matters with respect to the debtor:

- 327 (1) his name, place of residence<sup>1</sup> and occupation, if any;
- 328 (2) the name or names in which he carries on business<sup>2</sup>, if other than his true name, and whether, in the case of any business of a specified nature, he carries it on alone or with others;

- 329 (3) the nature of his business and the address or addresses at which he carries it on;
- 330 (4) any name or names, other than his true name, in which he has carried on business in the period in which any of his bankruptcy debts<sup>3</sup> were incurred and, in the case of any such business, whether he has carried it on alone or with others; and
- 331 (5) any address or addresses at which he has resided or carried on business during that period, and the nature of that business<sup>4</sup>.

If the debtor has at any time used a name other than one given under head (1) above, that fact must be stated in the petition<sup>5</sup>. The particulars of the debtor given under the above provisions determine the title of the proceedings<sup>6</sup>.

1 For the meaning of 'residence' see para 125 note 4 ante.

2 For the meaning of 'carry on business' see para 125 note 5 ante.

3 For the meaning of 'bankruptcy debt' see para 491 post.

4 Insolvency Rules 1986, SI 1986/1925, r 6.38(1).

5 Ibid r 6.38(3).

6 Ibid r 6.38(2).

## UPDATE

### 160-194 Procedure on bankruptcy petition

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 190. Admission of insolvency.

The petition must contain the statement that the petitioner is unable to pay his debts, and a request that a bankruptcy order be made against him<sup>1</sup>.

If, within the period of five years ending with the date of the petition, the petitioner has been adjudged bankrupt<sup>2</sup>, or has made a composition with his creditors in satisfaction of his debts or a scheme of arrangement of his affairs, or he has entered into any voluntary arrangement or been subject to an administration order under Part VI of the County Courts Act 1984<sup>3</sup>, particulars of these matters must be given in the petition<sup>4</sup>.

If there is at the date of the petition in force for the debtor a voluntary arrangement under Part VIII of the Insolvency Act 1986<sup>5</sup>, the particulars required under the above provisions must contain a statement to that effect and the name and address of the supervisor of the arrangement<sup>6</sup>.

- 1 Insolvency Rules 1986, SI 1986/1925, r 6.39(1).
- 2 As to bankruptcy orders on a debtor's petition see para 203 et seq post.
- 3 le under the County Courts Act 1984 Pt VI (ss 112-117) (as amended): see para 893 et seq post.
- 4 Insolvency Rules 1986, SI 1986/1925, r 6.39(2).
- 5 le under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.
- 6 Insolvency Rules 1986, SI 1986/1925, r 6.39(3) (added by SI 1987/1919). As to the supervisor of a voluntary arrangement see para 108 et seq ante.

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **191. Statement of affairs.**

The petition must be accompanied by a statement of the debtor's affairs, verified by affidavit<sup>1</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.41(1). Rules 6.67-6.72 (see paras 252-255 post) apply with respect to the statement of affairs: r 6.41(2). For the prescribed form of statement of affairs see rr 6.41, 12.7(1), (2), Sch 4, Form 6.28. As to the use of witness statements instead of affidavits in insolvency proceedings see r 7.57(5), (6) (as substituted); and para 793 post.

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **191 Statement of affairs**

NOTE 1--SI 1986/1925 Sch 4, Form 6.28 substituted: SI 2005/2114.

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BANKRUPTCY PETITION/(ii) Debtor's Petition/C. PRESENTATION AND FILING/192. Procedure for presentation and filing.

### ***C. PRESENTATION AND FILING***

#### **192. Procedure for presentation and filing.**

The petition and statement of affairs must be filed in court<sup>1</sup>, together with three copies of the petition, and two copies of the statement; and no petition may be filed unless there is produced with it the receipt for the deposit payable on presentation<sup>2</sup>. The court may hear the petition forthwith; but, if it does not do so, it must fix a venue<sup>3</sup> for the hearing<sup>4</sup>. If, however, the petition contains particulars of a voluntary arrangement under Part VIII of the Insolvency Act 1986<sup>5</sup> in force for the debtor, the court must fix a venue for the hearing and give at least 14 days' notice of it to the supervisor<sup>6</sup> of the arrangement; the supervisor may appear and be heard on the petition<sup>7</sup>.

Of the three copies of the petition delivered:

- 332 (1) one must be returned to the petitioner, indorsed with any venue fixed;
- 333 (2) another so indorsed must be sent by the court to the official receiver; and
- 334 (3) the remaining copy must be retained by the court, to be sent to an insolvency practitioner, if appointed<sup>8</sup>.

Of the two copies of the statement of affairs:

- 335 (a) one must be sent by the court to the official receiver; and
- 336 (b) the other must be retained by the court to be sent to the insolvency practitioner, if appointed<sup>9</sup>.

The affidavit<sup>10</sup> verifying the debtor's statement of affairs may be sworn before an officer of the court duly authorised in that behalf<sup>11</sup>.

Where the court hears a petition forthwith, or it will in the opinion of the court otherwise expedite the delivery of any document to the official receiver, the court may, instead of sending that document to the official receiver, direct the bankrupt forthwith to deliver it to him<sup>12</sup>.

Where a petition contains a request for the appointment of a former supervisor as trustee<sup>13</sup>, the person whose appointment is sought must, not less than two days before the day appointed for hearing the petition, file in court a report including particulars of:

- 337 (i) a date on which he gave written notification to creditors bound by the arrangement<sup>14</sup> of the intention to seek his appointment as trustee, such date to be at least ten days before the day on which the report under this provision is filed; and
- 338 (ii) details of any response from creditors to that notice, including any objections to his appointment<sup>15</sup>.

1 For the meaning of 'file in court' see para 95 note 10 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.42(1). As to the fee payable on presentation of the petition see para 164 ante.

3 For the meaning of 'venue' see para 84 note 21 ante.

- 4 Insolvency Rules 1986, SI 1986/1925, r 6.42(2) (amended by SI 1987/1919).
- 5 le under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.
- 6 As to the supervisor of a voluntary arrangement see para 108 et seq ante.
- 7 Insolvency Rules 1986, SI 1986/1925, r 6.42(2A) (added by SI 1987/1919).
- 8 Insolvency Rules 1986, SI 1986/1925, r 6.42(3) (amended by SI 1987/1919).
- 9 Insolvency Rules 1986, SI 1986/1925, r 6.42(4) (amended by SI 1987/1919). The appointment of the insolvency practitioner is under the Insolvency Act 1986 s 273(2): see para 200 post.
- 10 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.
- 11 Ibid r 6.42(5).
- 12 Ibid r 6.42(6) (added by SI 1987/1919).
- 13 le under the Insolvency Act 1986 s 297(5): see para 322 post.
- 14 As to the persons bound by the arrangement see para 107 head (2) ante.
- 15 Insolvency Rules 1986, SI 1986/1925, r 6.42(7) (added by SI 1987/1919).

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **192 Procedure for presentation and filing**

TEXT AND NOTES 2, 9--Now, only one copy of the statement must be filed, and that copy must be sent by the court to the official receiver: SI 1986/1925 r 6.42(1), (4) (amended by SI 2005/527).

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### **193. Notice to Chief Land Registrar.**

When the petition is filed, the court must forthwith send to the Chief Land Registrar notice of the petition, for registration in the register of pending actions<sup>1</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.43. For the prescribed form of application for registration see rr 6.43, 12.7(1), (2), Sch 4, Form 6.14 (substituted by SI 1987/1919).

## **UPDATE**

### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **194. Abuse of process in presenting own petition.**

When the presentation of the petition by the debtor is an abuse of its process, the court may decline to make any order on it, or may rescind a bankruptcy order made on it<sup>1</sup>. Where, therefore, an undischarged bankrupt made a practice of incurring credit and then presenting his own petition to evade committal orders against him on judgment summonses, the presentation of such a petition was an abuse of the process of the court, and no bankruptcy order should be made on it, or, if made, it should be rescinded<sup>2</sup>; and the presentation of a bankruptcy petition against himself by a debtor who is already fully protected by an instalment order is an abuse of process<sup>3</sup>. However, the mere presentation by the debtor of a petition to evade a committal order under a judgment summons has been held not to constitute an abuse of the process of the court, it being the legislature's intention in a proper case to enable a debtor to relieve himself from the pressure of a committal order by obtaining an adjudication in bankruptcy against himself<sup>4</sup>.

1 A joint petition presented by husband and wife, who are neither partners nor joint traders and have no joint assets or liabilities, in order to avoid paying two petition fees is an abuse of the process of the court; and in such a case the name of one of the joint petitioners will be struck out: *Re Bond* (1888) 21 QBD 17. Where a first petition has been dismissed for fraud, the court may dismiss any subsequent petition and order that no further petition be filed without permission: *Re Bachelor* (1855) 25 LTOS 248. See also *Re Sydney, ex p Sydney* (1875) 10 Ch App 208 (where a second petition was dismissed after sanction of a composition).

2 *Re Betts, ex p Official Receiver* [1901] 2 KB 39. A petition presented by a divorced husband or wife with the intention of frustrating the enforcement of his or her ex-spouse's financial or property rights will be an abuse of process: *Re Holliday (a bankrupt), ex p Trustee of Bankrupt v Bankrupt* [1981] Ch 405, [1980] 3 All ER 385, CA; *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA.

3 *Re A Debtor (No 17 of 1966), ex p Debtor v Allen* [1967] Ch 590, [1967] 1 All ER 668, DC, distinguishing *Re Painter, ex p Painter* [1895] 1 QB 85, DC; *Re Hancock, ex p Hillearys* [1904] 1 KB 585, CA.

4 *Re Painter, ex p Painter* [1895] 1 QB 85, DC; *Re Hancock, ex p Hillearys* [1904] 1 KB 585, CA; *Re Archer, ex p Archer* (1904) 20 TLR 390. As to committal orders (the jurisdiction to make which is now substantially restricted) see the Debtors Act 1869 s 5 (as amended), the Administration of Justice Act 1970 s 11, Sch 4 (as amended), the Attachment of Earnings Act 1971 s 3(4)-(7) (as amended); and COURTS.

### **UPDATE**

#### **160-194 Procedure on bankruptcy petition**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/(i) Creditor's Petition/195. Proceedings on creditor's petition.

## **(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION**

### **(i) Creditor's Petition**

#### **195. Proceedings on creditor's petition.**

The court may not make a bankruptcy order on a creditor's petition<sup>1</sup> unless it is satisfied that the debt, or one of the debts, in respect of which the petition was presented is either:

- 339 (1) a debt which, having been payable at the date of the petition or having since become payable, has neither been paid nor secured nor compounded for; or
- 340 (2) a debt which the debtor has no reasonable prospect of being able to pay when it falls due<sup>2</sup>.

In a case in which the petition contains a statement<sup>3</sup> that there is a serious possibility that the debtor's property or the value of any of his property will be significantly diminished during the three-week period from service of the statutory demand, the court may not make a bankruptcy order until at least three weeks have elapsed since the service of the statutory demand<sup>4</sup>.

The court may dismiss the petition if it is satisfied that the debtor is able to pay all his debts or is satisfied:

- 341 (a) that the debtor has made an offer to secure or compound for a debt in respect of which the petition is presented;
- 342 (b) that the acceptance of that offer would have required the dismissal of the petition; and
- 343 (c) that the offer has been unreasonably refused;

and, in determining for the above purposes whether the debtor is able to pay all his debts, the court must take into account his contingent and prospective liabilities<sup>5</sup>.

Nothing in the statutory provisions<sup>6</sup> prejudices the power of the court<sup>7</sup> to authorise a creditor's petition to be amended by the omission of the creditor or debt and to be proceeded with as if things done for the purposes of those provisions had been done only by or in relation to the remaining creditors or debts<sup>8</sup>.

1 le under the Insolvency Act 1986 s 264(1)(a): see para 124 head (1) ante.

2 Ibid s 271(1). In determining, for these purposes, what constitutes a reasonable prospect that a debtor will be able to pay a debt when it falls due, it is to be assumed that the prospect given by the facts and other matters known to the creditor at the time he entered into the transaction resulting in the debt was a reasonable prospect: *ibid* s 271(4).

Where a payment in respect of the petition debt is made by a debtor out of his own property, the debt will only be paid within the meaning of s 271(1) where the payment is unconditional in that it is not liable to be avoided in the event of the court making a bankruptcy order: *Smith v Ian Simpson & Co* [2001] Ch 239, [2000] 3 All ER 434, CA. The court may make a bankruptcy order notwithstanding that a payment has been made to reduce the petition debt to below the bankruptcy level: *Lilley v American Express Europe Ltd* [2000] BPIR 70; cf *Re Patel (a debtor)* [1986] 1 All ER 522, sub nom *Re Patel (a debtor), ex p Debtor v Dallamo* [1986] 1 WLR 221, DC (a decision under the Bankruptcy Act 1914).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the court may make an insolvency administration order on a petition for such an order under the Insolvency Act 1986 s 264(1) (as modified) (see para 124 note 13 ante) if it is satisfied: (1) that the debt, or one of the debts, in respect of which the petition was presented is a debt which: (a) having been payable at the date of the petition or having since become payable, has neither been paid nor secured or compounded for; or (b) has no reasonable prospect of being able to be paid when it falls due; and (2) that there is a reasonable probability that the estate will be insolvent: s 271(1) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 5). A petition for an insolvency administration order may not, however, be presented to the court after proceedings have been commenced in any court of justice for the administration of the deceased debtor's estate: Insolvency Act 1986 s 271(2) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 5). Where proceedings have been commenced in any such court for the administration of the deceased debtor's estate, that court may, if satisfied that the estate is insolvent, transfer the proceedings to the court exercising jurisdiction for the purposes of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended): s 271(3) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 5). Where proceedings have been transferred to the court so exercising jurisdiction, that court may make an insolvency administration order in the prescribed form as if a petition for such an order has been presented under the Insolvency Act 1986 s 264 (as modified) (see para 124 ante): s 271(4) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 5). For the prescribed form of insolvency administration order see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 5. Nothing in the Insolvency Act 1986 ss 264, 266, 269 or 271-273 (as modified) invalidates any payment made or any act or thing done in good faith by the personal representative before the date of the insolvency administration order: s 271(5) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 5). As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

As to the modification of the Insolvency Act 1986 s 271 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 821 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1228, 1263.

3 le a statement as is required by the Insolvency Act 1986 s 270: see para 128 ante.

4 Ibid s 271(2). The statutory demand is served under s 268: see para 127 ante.

5 Ibid s 271(3). A voluntary arrangement proposed by a debtor pursuant to Pt VIII (ss 252-263) is not an offer to each creditor which is capable of being accepted or refused by the petitioning creditor within the meaning of s 271(3): *Re a Debtor (No 2389 of 1989)* [1991] Ch 326, sub nom *Re a Debtor (No 2389 of 1989)*, ex p *Travel and General Insurance Co plc v Debtor* [1990] 3 All ER 984.

The test of whether an offer has been unreasonably refused is whether the decision by the petitioning creditor falls outside the range of positions which could have been adopted by a hypothetical reasonable creditor in the circumstances: *Re a Debtor (No 32 of 1993)* [1994] 1 WLR 899, [1994] BCC 438; *Re a Debtor (No 6349 of 1994)*, *IRC v Debtor* [1996] BPIR 271. The test is an objective one and the court is not limited to taking into account only those considerations which were taken into account by the petitioning creditor himself: *Customs and Excise Comrs v Dougall* [2001] BPIR 269. The onus is on the debtor to be full, frank and open in making an offer to the petitioning creditor; accordingly, a creditor would not be acting unreasonably in rejecting an offer of property as security where the value of the property was unclear: *Maple Division Ltd v Wilson* [1999] BPIR 102.

6 le the Insolvency Act 1986 ss 267-271: see supra; and para 126 et seq ante.

7 le in accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended). As to the court's power to amend a creditor's petition see r 6.22; and para 169 ante.

8 Insolvency Act 1986 s 271(5).

## UPDATE

### 195-215 Bankruptcy orders; summary administration

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 195 Proceedings on creditor's petition

NOTE 2--SI 1986/1999 Sch 3 Form 5 substituted: SI 2002/1309. See *Adams v Mason Bullock (a firm)* [2004] EWHC 2910 (Ch), [2004] All ER (D) 292 (Dec) (point not argued at proceedings to set aside statutory demand treated as abandoned).

NOTE 5--See *Ross v HM Revenue and Customs Comrs* [2010] EWHC 13 (Ch), [2010] 2 All ER 126 (rejection of offer of legal charge over property well within range of reasonable responses open to Commissioners).

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### 196. Decision on hearing.

On the hearing of a creditor's petition<sup>1</sup>, the court may make a bankruptcy order if satisfied that the statements in the petition are true, and the debt on which it is founded has not been paid, or secured or compounded for<sup>2</sup>.

If the petition is brought in respect of a judgment debt, or a sum ordered by any court to be paid, the court may stay or dismiss the petition on the ground that an appeal is pending from the judgment or order, or that execution of the judgment has been stayed<sup>3</sup>.

A petition preceded by a statutory demand<sup>4</sup> may not be dismissed on the ground only that the amount of the debt was overstated in the demand, unless the debtor, within the time allowed for complying with the demand, gave notice to the creditor disputing the validity of the demand on that ground; but, in the absence of such notice, the debtor is deemed to have complied with the demand if he has, within the time allowed, paid the correct amount<sup>5</sup>.

1 As to creditors' petitions see paras 126 et seq, 160 et seq ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.25(1). As to the ability of a debtor to raise issues on the hearing of the petition which have already been raised on an unsuccessful application to set aside the statutory demand see para 158 note 13 ante.

On the hearing of a petition for a bankruptcy order, to satisfy the court that the debt on which the petition is founded has not been paid or secured or compounded for, the court will normally accept as sufficient a certificate signed by the person representing the petitioning creditor in the following form:

'I certify that I have/my firm has made inquiries of the petitioning creditor(s) within the last business day prior to the hearing/adjourned hearing and to the best of my knowledge and belief the debt on which the petition is founded is still due and owing and has not been paid or secured or compounded (save as to )

Signed

Dated

'

For the convenience of practitioners this certificate will be printed on the attendance slips. It will be filed after the hearing. A fresh certificate will be required on each adjourned hearing: *Practice Direction-Insolvency Proceedings* para 15.9.

The existence of a prior foreign bankruptcy or concurrent bankruptcy proceedings in respect of a debtor will not prevent the court from making a bankruptcy order against the debtor; but as to the court's power to dismiss a petition under the Insolvency Act s 266(3) on this ground see para 124 ante.

On appeal against a bankruptcy order, the court may require the bankrupt to give security for costs: *Hocking v Walker* [1997] BPIR 93, CA.

3 Insolvency Rules 1986, SI 1986/1925, r 6.25(2). As to the position where there is a pending appeal against the judgment on which the petition is based see *Heath v Tang*, *Stevens v Peacock* [1993] 4 All ER 694, [1993] 1 WLR 1421, CA; *Re A Debtor (No 799 of 1994)*, ex p *Cobbs Property Services Ltd* [1995] 3 All ER 723, [1995] 1

WLR 467. For the prescribed form of dismissal of a bankruptcy petition see the Insolvency Rules 1986, SI 1986/1925, rr 6.25, 12.7(1), (2), Sch 4, Form 6.22.

Although a court will treat a judgment for a sum of money as prima facie evidence that the judgment creditor is indebted to the judgment debtor for that sum, the court may in appropriate circumstances go behind the judgment to inquire into the circumstances in which the judgment was obtained and, if so satisfied, treat it as not creating or evidencing any debt enforceable in bankruptcy proceedings: *McCourt and Siequien v Baron Meats Ltd and Official Receiver* [1997] BPIR 114, DC (a decision under the Bankruptcy Act 1914). See also *Re Yeatman, ex p Yeatman* (1880) 16 ChD 283, CA; *Eberhardt & Co Ltd v Mair* [1995] 3 All ER 963, [1995] 1 WLR 1180. The bankruptcy court has jurisdiction to go behind a default judgment and inquire as to the existence of a debt: *Royal Bank of Scotland v Farley* [1996] BPIR 638, CA.

4 As to statutory demands see para 154 et seq ante.

5 Insolvency Rules 1986, SI 1986/1925, r 6.25(3). As to the setting aside of statutory demands on the ground that the debt demanded is overstated see para 158 note 7 ante.

## UPDATE

### 195-215 Bankruptcy orders; summary administration

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 196 Decision on hearing

TEXT AND NOTES--For the purposes of a demand made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 372(4)(a) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 501), SI 1986/1925 r 6.25 applies as if references to the debtor were references to an individual, and references to the creditor were references to the Financial Services Authority: Bankruptcy (Financial Services and Markets Act 2000) Rules 2001, SI 2001/3634, r 6(1). For the meaning of 'individual' for these purposes see PARA 154.

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### 197. Settlement and content of bankruptcy order.

The bankruptcy order must be settled by the court; and the order must:

- 344 (1) state the date of the presentation of the petition on which the order is made, and the date and time of the making of the order; and
- 345 (2) contain a notice requiring the bankrupt, forthwith after service of the order on him, to attend on the official receiver at the place stated in the order<sup>1</sup>.

Subject to the statutory provisions relating to the effect of bankruptcy on enforcement procedures<sup>2</sup>, the order may include provision staying any action or proceeding against the bankrupt<sup>3</sup>. Where the petitioning creditor is represented by a solicitor<sup>4</sup>, the order must be indorsed with the latter's name, address, telephone number and reference, if any<sup>5</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.33(1), (2). For the prescribed form of bankruptcy order see rr 6.33, 12.7(1), (2), Sch 4, Form 6.25.

2 le the Insolvency Act 1986 s 346: see para 678 et seq post.

3 Insolvency Rules 1986, SI 1986/1925, r 6.33(3).

4 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

5 Insolvency Rules 1986, SI 1986/1925, r 6.33(4).

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **197 Settlement and content of bankruptcy order**

NOTE 1--SI 1986/1925 Form 6.25 substituted: SI 2003/1730.

NOTE 4--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

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### **198. Action to follow making of order.**

At least two sealed copies of the bankruptcy order must be sent forthwith by the court to the official receiver, who must forthwith send one of them to the bankrupt<sup>1</sup>. The official receiver must:

- 346 (1) send notice<sup>2</sup> of the making of the order to the Chief Land Registrar, for registration in the register of writs and orders affecting land;
- 347 (2) cause the order to be advertised in such newspaper as the official receiver thinks fit; and
- 348 (3) cause the order to be gazetted<sup>3</sup>.

On the application of the bankrupt or a creditor, the court may order the official receiver to suspend action under the above provisions pending a further order of the court<sup>4</sup>; and, where an order is so made, the applicant for the order must forthwith deliver a copy of it to the official receiver<sup>5</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.34(1).



2 For the prescribed form of notice see *ibid* rr 6.34, 12.7(1), (2), Sch 4, Form 6.26 (substituted by SI 1987/1919).

3 Insolvency Rules 1986, SI 1986/1925, r 6.34(2) (amended by SI 1991/495). As to gazetting orders see para 787 post.

4 Insolvency Rules 1986, SI 1986/1925, r 6.34(3). The court may also order the official receiver to suspend registration under r 6.233(B)(1) (as added) (see para 210 post): r 6.34(3) (amended by SI 1999/359). An application under the Insolvency Rules 1986, SI 1986/1925, r 6.34(3) (as so amended) must be supported by an affidavit stating the grounds on which it is made: r 6.34(3) (as so amended). As to the use of witness statements instead of affidavits in insolvency proceedings see r 7.57(5), (6) (as substituted); and para 793 post.

5 *Ibid* r 6.34(4).

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **198 Action to follow making of order**

TEXT AND NOTES 1-3--SI 1986/1925 r 6.34(2) substituted: SI 2009/642.

NOTE 4--Reference to SI 1986/1925 r 6.233(B)(1) is now to r 6A.4(2) (see PARA 106): r 6.34(3) (amended by SI 2005/527).

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### **199. Amendment of title of proceedings.**

At any time after the making of a bankruptcy order, the official receiver or the trustee may apply to the court for an order amending the full title of the proceedings<sup>1</sup>. Where such an order is made, the official receiver must forthwith send notice of it to the Chief Land Registrar, for corresponding amendment of the register; and, if the court so directs, he must also cause notice of the order to be gazetted<sup>2</sup>, and to be advertised in such newspaper as the official receiver thinks fit<sup>3</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.35(1). As to the title of proceedings see para 161 ante.

2 As to gazetting notices see para 787 post.

3 Insolvency Rules 1986, SI 1986/1925, r 6.35(2) (amended by SI 1991/495).

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **199 Amendment of title of proceedings**

TEXT AND NOTES 2, 3--SI 1986/1925 r 6.35(2) substituted, r 6.35(3) added: SI 2009/642.

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### **(ii) Debtor's Petition**

#### **A. APPOINTMENT OF INSOLVENCY PRACTITIONER**

##### **200. Appointment of insolvency practitioner by the court.**

On the hearing of a debtor's petition<sup>1</sup>, the court may not make a bankruptcy order if it appears to the court:

- 349 (1) that, if a bankruptcy order were made, the aggregate amount of the bankruptcy debts<sup>2</sup>, so far as unsecured<sup>3</sup>, would be less than the small bankruptcies level<sup>4</sup>;
- 350 (2) that, if a bankruptcy order were made, the value of the bankrupt's estate<sup>5</sup> would be equal to more than the minimum amount<sup>6</sup>;
- 351 (3) that, within the period of five years ending with the presentation of the petition, the debtor has neither been adjudged bankrupt nor made a composition with his creditors in satisfaction of his debts or a scheme of arrangement of his affairs; and
- 352 (4) that it would be appropriate to appoint a person to prepare a report<sup>7</sup> stating whether the debtor is willing to make a proposal for a voluntary arrangement<sup>8</sup>.

Where, on the hearing of the petition, it appears to the court as mentioned above, the court must appoint a person who is qualified to act as an insolvency practitioner in relation to the debtor<sup>9</sup> to prepare a report<sup>10</sup> and to act<sup>11</sup> in relation to any voluntary arrangement to which the report relates either as trustee or otherwise for the purpose of supervising its implementation<sup>12</sup>.

1 As to debtors' petitions see paras 159, 188 et seq ante.

2 For the meaning of 'bankruptcy debt' see para 491 post.

3 As to secured creditors see para 560 et seq post.

4 For these purposes, 'the small bankruptcies level' means such amount as may for the time being be prescribed for the purposes of the Insolvency Act 1986 s 273: s 273(1). The amount so prescribed is £20,000: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 3, Schedule Pt II. As to the Secretary of State's power to prescribe monetary limits see para 22 ante.

In the Insolvency Act 1986, subject to s 384(2) and to s 342C(7) (as added) (see para 669 post) and s 342F(9) (as added) (see para 671 post), 'prescribed' means prescribed by the rules; and 'rules' means rules made under s 412 (see para 753 post): s 384(1) (amended by the Welfare Reform and Pensions Act 1999 s 84(1), Sch 12

paras 70, 72). However, references in the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) to the amount prescribed for the purposes of any of s 273 (see supra), s 346(3) (see para 678 et seq post), s 354(1), (2) (see paras 709, 710 respectively post), s 358 (see para 718 post), s 360(1) (see para 721 post), s 361(2) (see para 722 post), s 364(2)(d) (see para 221 head (d) post), and references in those provisions to the prescribed amount, are to be read in accordance with s 418 (see para 22 ante) and orders made under s 418: s 384(2).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 384 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 32. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 For the meaning of 'the bankrupt's estate' see para 216 post.

6 For these purposes, 'the minimum amount' means such amount as may for the time being be prescribed for the purposes of the Insolvency Act 1986 s 273: s 273(1). The amount so prescribed is £2,000: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 3, Schedule Pt II.

7 Ie under the Insolvency Act 1986 s 274: see para 202 post.

8 Ibid s 273(1). Section 273 is subject to s 274: s 273(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the court must make an insolvency administration order in the prescribed form on the hearing of a petition presented under s 272 (as modified) (see para 159 ante) if it is satisfied that the deceased debtor's estate is insolvent: s 273 (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 7). For the prescribed form of insolvency administration order see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 4.

In the case of the bankruptcy of an individual member of an insolvent partnership (see para 817 et seq post), the Insolvency Act 1986 s 273 is in certain circumstances to be omitted: see the Insolvent Partnerships Order 1994, SI 1994/2421, arts 10(4), (5)(a), 11(1), (2)(a); paras 820-822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1260, 1266.

9 As to insolvency practitioners and their qualification see para 42 et seq ante.

10 Ie under the Insolvency Act 1986 s 274: see para 202 post.

11 Ie subject to ibid s 258(3): see para 100 ante.

12 Ibid s 273(2). For the prescribed form of order of appointment of an insolvency practitioner to prepare a report under s 274(1) see the Insolvency Rules 1986, SI 1986/1925, rr 6.44, 12.7(1), (2), Sch 4, Form 6.29.

## UPDATE

### 195-215 Bankruptcy orders; summary administration

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 200 Appointment of insolvency practitioner by the court

TEXT AND NOTES--Where the court does not appoint an insolvency practitioner under the Insolvency Act 1986 s 273, and it appears to the court that a debt relief order would be made in relation to the debtor if, instead of presenting the petition, he had made an application under Pt 7A (ss 251A-251X), if the court thinks it would be in the debtor's interests to apply for a debt relief order instead of proceeding on the petition, the court may refer the debtor to an approved intermediary for the purposes of making an application for a debt relief order: s 274A (added by the Tribunals, Courts and Enforcement Act 2007 Sch 20 para 3).

NOTES 4-6--SI 1986/1996 art 3 amended: SI 2009/465.

NOTE 4--The 'small bankruptcies level' is now £40,000: SI 1986/1996 Schedule Pt II (substituted by SI 2004/547). References in the Insolvency Act 1986 Pts VIII-XI (ss 252-385) to the amount prescribed for the purposes of s 283A (see PARA 401 TEXT AND NOTES 1-3), and references in that provision to the prescribed amount, are also to be read in accordance with s 418 and orders made under s 418: s 384(2) (amended by the Enterprise Act 2002 s 261(5)). The list of provisions of the Insolvency Act 1986 now includes s 251S(4) (see PARA 123B) and Sch 4ZA paras 6-8 (see PARA 123B): s 384(2) (amended by the Tribunals, Courts and Enforcement Act 2007 Sch 20 para 4).

NOTE 6--The amount is now £4,000: SI 1986/1996 Schedule Pt II (substituted by SI 2004/547).

NOTE 8--SI 1986/1999 Sch 3 Form 4 substituted: SI 2002/1309.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/ (ii) Debtor's Petition/A. APPOINTMENT OF INSOLVENCY PRACTITIONER/201. Report of insolvency practitioner.

## **201. Report of insolvency practitioner.**

If the court appoints an insolvency practitioner<sup>1</sup> to act in the debtor's case<sup>2</sup>, it must forthwith:

- 353 (1) send to the person appointed a sealed copy of the order of appointment, and copies of the petition<sup>3</sup> and statement of affairs<sup>4</sup>;
- 354 (2) fix a venue<sup>5</sup> for the insolvency practitioner's report to be considered; and
- 355 (3) send notice of the venue to the insolvency practitioner and the debtor<sup>6</sup>.

The insolvency practitioner must file his report in court<sup>7</sup>, and send one copy of it to the debtor, so as to be in his hands not less than three days before the date fixed for consideration of the report, and a further copy to the official receiver<sup>8</sup>. The debtor is entitled to attend when the report is considered, and must attend if so directed by the court; and, if he attends, the court must hear any representations which he makes with respect to any of the matters dealt with in the report<sup>9</sup>.

1 As to insolvency practitioners and their qualification see para 42 et seq ante.

2 Ie under the Insolvency Act 1986 s 273(2): see para 200 ante.

3 As to the debtor's petition see para 188 et seq ante.

4 As to the statement of affairs see para 191 ante.

5 For the meaning of 'venue' see para 84 note 21 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 6.44(1).

7 For the meaning of 'file in court' see para 95 note 10 ante.

8 Insolvency Rules 1986, SI 1986/1925, r 6.44(2) (amended by SI 1987/1919).

9 Insolvency Rules 1986, SI 1986/1925, r 6.44(3).

## **UPDATE**

## **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/ (ii) Debtor's Petition/A. APPOINTMENT OF INSOLVENCY PRACTITIONER/202. Action on report of insolvency practitioner.

### **202. Action on report of insolvency practitioner.**

A person appointed by the court<sup>1</sup> must inquire into the debtor's affairs<sup>2</sup> and, within such period as the court may direct, must submit a report to the court stating whether the debtor is willing, for the purposes of Part VIII of the Insolvency Act 1986<sup>3</sup>, to make a proposal for a voluntary arrangement<sup>4</sup>.

A report which states that the debtor is willing so to make a proposal for a voluntary arrangement must also state:

- 356 (1) whether, in the opinion of the person making the report, a meeting of the debtor's creditors should be summoned to consider the proposal; and
- 357 (2) if in that person's opinion such a meeting should be summoned, the date on which, and time and place at which, he proposes the meeting should be held<sup>5</sup>.

On considering a report under the above provisions, the court may:

- 358 (a) without any application, make an interim order<sup>6</sup>, if it thinks that it is appropriate to do so for the purpose of facilitating the consideration and implementation of the debtor's proposal; or
- 359 (b) if it thinks it would be inappropriate to make such an order, make a bankruptcy order<sup>7</sup>.

1    Ie under the Insolvency Act 1986 s 273: see para 200 ante.

2    For the meaning of references to a person's affairs see para 81 note 4 ante.

3    Ie for the purposes of the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.

4    Ibid s 274(1). In the case of the bankruptcy of an individual member of an insolvent partnership (see para 817 et seq post), s 274 is in certain circumstances to be omitted: see the Insolvent Partnerships Order 1994, SI 1994/2421, arts 10(4), (5)(a), 11(1), (2)(a); paras 820-822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1260, 1266.

5    Insolvency Act 1986 s 274(2). Where it has been reported to the court under s 274 that a meeting of the debtor's creditors should be summoned, the person making the report must, unless the court otherwise directs, summon that meeting for the time, date and place proposed in the report; and the meeting is then deemed to have been summoned under s 257 (see para 97 ante), and ss 257(2), (3), 258-263 (see para 97 et seq ante) apply accordingly: s 274(5).

6    Ie under ibid s 252: see para 83 ante. An interim order made by virtue of s 274 ceases to have effect at the end of such period as the court may specify for the purpose of enabling the debtor's proposal to be considered by his creditors in accordance with the applicable provisions of Pt VIII (ss 252-263): s 274(4).

7 Ibid s 274(3).

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/ (ii) Debtor's Petition/B. MAKING OF BANKRUPTCY ORDER/203. Settlement and content of bankruptcy order.

## ***B. MAKING OF BANKRUPTCY ORDER***

### **203. Settlement and content of bankruptcy order.**

The bankruptcy order must be settled by the court<sup>1</sup>; and the order must:

- 360 (1) state the date of the presentation of the petition on which the order is made, and the date and time of the making of the order; and
- 361 (2) contain a notice requiring the bankrupt, forthwith after the service of the order on him, to attend on the official receiver at the place stated in the order<sup>2</sup>.

Subject to the statutory provisions relating to the effect of bankruptcy on enforcement procedures<sup>3</sup>, the order may include provision staying any action or proceeding against the bankrupt<sup>4</sup>. Where the bankrupt is represented by a solicitor<sup>5</sup>, the order must be indorsed with the latter's name, address, telephone number and reference<sup>6</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.45(1). For the prescribed form of bankruptcy order see rr 6.45, 12.7(1), (2), Sch 4, Form 6.30 (substituted by SI 1987/1919).

2 Insolvency Rules 1986, SI 1986/1925, r 6.45(2).

3 le subject to the Insolvency Act 1986 s 346: see para 678 et seq post.

4 Insolvency Rules 1986, SI 1986/1925, r 6.45(3).

5 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

6 Insolvency Rules 1986, SI 1986/1925, r 6.45(4).

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## 203 Settlement and content of bankruptcy order

NOTE 5--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/ (ii) Debtor's Petition/B. MAKING OF BANKRUPTCY ORDER/204. Action to follow making of order.

### 204. Action to follow making of order.

At least two sealed copies of the bankruptcy order must be sent forthwith by the court to the official receiver, who must forthwith send one of them to the bankrupt<sup>1</sup>. The official receiver must:

- 362 (1) send notice<sup>2</sup> of the making of the order to the Chief Land Registrar, for registration in the register of writs and orders affecting land;
- 363 (2) cause the order to be advertised in such newspaper as the official receiver thinks fit; and
- 364 (3) cause notice of the order to be gazetted<sup>3</sup>.

However, on the application of the bankrupt or a creditor, the court may order the official receiver to suspend action<sup>4</sup>, pending a further order of the court; and any such application must be supported by an affidavit<sup>5</sup> stating the grounds on which it is made<sup>6</sup>. Where an order is so made, the applicant must forthwith deliver a copy of it to the official receiver<sup>7</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.46(1).

2 For the prescribed form of notice see *ibid* rr 6.46, 12.7(1), (2), Sch 4, Form 6.26 (substituted by SI 1987/1919).

3 Insolventcy Rules 1986, SI 1986/1925, r 6.46(2) (amended by SI 1991/495). As to gazetting notices see para 787 post.

4 *Ie* under the Insolventcy Rules 1986, SI 1986/1925, r 6.46(2) (as amended) (see *supra*) and r 6.223(B)(1) (as added) (see para 211 post).

5 As to the use of witness statements instead of affidavits in insolventcy proceedings see *ibid* r 7.57(5), (6) (as substituted); and para 793 post.

6 *Ibid* r 6.46(3) (amended by SI 1999/359).

7 Insolventcy Rules 1986, SI 1986/1925, r 6.46(4).

## UPDATE

### 195-215 Bankruptcy orders; summary administration

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **204 Action to follow making of order**

TEXT AND NOTES 1-3--SI 1986/1925 r 6.46(2) substituted: SI 2009/642.

NOTE 6--Reference to SI 1986/1925 r 6.233(B)(1) is now to r 6A.4(2) (see PARA 106): r 6.46(3) (amended by SI 2005/527).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/ (ii) Debtor's Petition/B. MAKING OF BANKRUPTCY ORDER/205. Amendment of title of proceedings.

## **205. Amendment of title of proceedings.**

At any time after the making of the bankruptcy order, the official receiver or the trustee may apply to the court for an order amending the full title of the proceedings<sup>1</sup>. Where such an order is made, the official receiver must forthwith send notice of it to the Chief Land Registrar, for corresponding amendment of the register; and, if the court so directs, he must also:

- 365 (1) cause notice of the order to be gazetted<sup>2</sup>; and
- 366 (2) cause notice of the order to be advertised in such newspaper as the official receiver thinks appropriate<sup>3</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.47(1). As to the title of proceedings see para 189 ante.

2 As to gazetting notices see para 787 post.

3 Insolventcy Rules 1986, SI 1986/1925, r 6.47(2) (amended by SI 1991/495).

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **205 Amendment of title of proceedings**

TEXT AND NOTES 2, 3--SI 1986/1925 r 6.47(2) substituted, r 6.47(3) added: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/ (ii) Debtor's Petition/C. SUMMARY ADMINISTRATION/206. Summary administration.

## ***C. SUMMARY ADMINISTRATION***



## 206. Summary administration.

Where, on the hearing of a debtor's petition, the court makes a bankruptcy order and the case is as specified below, the court must, if it appears to it appropriate to do so, issue a certificate for the summary administration of the bankrupt's estate<sup>1</sup>.

That case is where it appears to the court:

- 367 (1) that, if a bankruptcy order were made, the aggregate amount of the bankruptcy debts<sup>2</sup>, so far as unsecured<sup>3</sup>, would be less than the small bankruptcies level<sup>4</sup>; and
- 368 (2) that, within the period of five years ending with the presentation of the petition, the debtor has neither been adjudged bankrupt nor made a composition with his creditors in satisfaction of his debts or a scheme of arrangement of his affairs,

whether the bankruptcy order is made because it does not appear to the court:

- 369 (a) that, if a bankruptcy order were made, the value of the bankrupt's estate would be equal to or more than the minimum amount<sup>5</sup>; or
- 370 (b) that it would be appropriate to appoint a person to prepare a report<sup>6</sup>,

or it is made because the court thinks it would be inappropriate to make an interim order<sup>7</sup>.

If the court issues a certificate for the summary administration of the bankrupt's estate<sup>8</sup>, the certificate may be included in the bankruptcy order<sup>9</sup>. If the certificate is not so included, the court must forthwith send copies of it to the official receiver and the bankrupt<sup>10</sup>.

1 Insolvent Partnership Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1271.

2 For the meaning of 'bankruptcy debt' see para 491 post.

3 As to secured creditors see para 560 et seq post.

4 ie within the meaning given by the Insolvent Partnership Order 1994 s 273: see para 200 note 4 ante.

5 ie because it does not appear to the court as mentioned in ibid s 273(1)(b): see para 200 head (2) ante.

6 ie because it does not appear to the court as mentioned in ibid s 273(1)(d): see para 200 head (4) ante.

7 Ibid s 275(2). The interim order is made under s 252: see para 83 ante.

8 ie under ibid s 275: see supra.

9 Insolvent Partnership Order 1994, SI 1994/2421, r 6.48(1). For the prescribed form of bankruptcy order see rr 6.48, 12.7(1), (2), Sch 4, Form 6.30 (substituted by SI 1987/1919).

10 Insolvent Partnership Order 1994, SI 1994/2421, r 6.48(2).

## UPDATE

### 195-215 Bankruptcy orders; summary administration

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **206-209 Summary Administration**

Provisions of Insolvency Act 1986 concerning summary administration repealed: Enterprise Act 2002 Schs 23, 26.

### **206 Summary administration**

TEXT AND NOTES 1-7--Repealed: Enterprise Act 2002 Sch 23 para 2, Sch 26.

TEXT AND NOTES 8-10--Revoked: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/ (ii) Debtor's Petition/C. SUMMARY ADMINISTRATION/207. Trustee in summary administration.

### **207. Trustee in summary administration.**

Where the court issues a certificate for the summary administration of a bankrupt's estate, the official receiver is the trustee, as from the issue of that certificate<sup>1</sup>. Where, however, such a certificate is issued or is in force, the court may, if it thinks fit, appoint a person other than the official receiver as trustee<sup>2</sup>. The power to appoint a person as trustee of a bankrupt's estate, whether the first such trustee or a trustee appointed to fill any vacancy, is not exercisable, at a time when a certificate for the summary administration of the bankrupt's estate is in force, by a general meeting of the bankrupt's creditors<sup>3</sup>. A general meeting of the bankrupt's creditors may not be held for the purpose of removing the trustee at any time when a certificate for the summary administration of the estate is in force<sup>4</sup>.

1 Insolvency Act 1986 s 297(2). As to the issue of the certificate see para 206 ante.

2 Ibid s 297(3). See further para 322 post.

3 See ibid s 292(1)(a); and para 317 head (1) post.

4 See ibid s 298(3); and para 361 post.

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **206-209 Summary Administration**

Provisions of Insolvency Act 1986 concerning summary administration repealed:  
Enterprise Act 2002 Schs 23, 26.

## **207 Trustee in summary administration**

TEXT AND NOTES--Repealed: Enterprise Act 2002 Sch 23 paras 6, 9, 10, Sch 26.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/ (ii) Debtor's Petition/C. SUMMARY ADMINISTRATION/208. Duty of official receiver in summary administration.

## **208. Duty of official receiver in summary administration.**

Where a certificate for the summary administration of the bankrupt's estate is for the time being in force, the official receiver must carry out an investigation into the conduct and affairs of the bankrupt only if he thinks fit<sup>1</sup>. Where a trustee has been appointed<sup>2</sup>, the official receiver must send a copy of the certificate of summary administration, whether or not included in the bankruptcy order, to him<sup>3</sup>. Within 12 weeks after the issue of the certificate, the official receiver must, in so far as he has not already done so, give notice to creditors of the making of the bankruptcy order<sup>4</sup>.

1 Insolvency Act 1986 s 289(5). As to the duty of the official receiver to carry out an investigation into the conduct and affairs of every bankrupt, and, where appropriate, make a report to the court see s 289(1); and para 256 post.

2 As to the appointment of the trustee see para 207 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.49(1).

4 Ibid r 6.49(2).

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **206-209 Summary Administration**

Provisions of Insolvency Act 1986 concerning summary administration repealed:  
Enterprise Act 2002 Schs 23, 26.

## **208 Duty of official receiver in summary administration**

TEXT AND NOTE 1--For provisions corresponding to those contained in the Insolvency Act 1986 s 289(1), see now s 289(1) (s 289 substituted by Enterprise Act 2002 s 258).

TEXT AND NOTES 2-4--Revoked: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/ (ii) Debtor's Petition/C. SUMMARY ADMINISTRATION/209. Revocation of certificate of summary administration.

## **209. Revocation of certificate of summary administration.**

The court may at any time revoke a certificate of summary administration<sup>1</sup> if it appears to it that, on any grounds existing at the time the certificate was issued, the certificate ought not to have been issued<sup>2</sup>; and it may do so either of its own motion or on the application of the official receiver<sup>3</sup>. If the official receiver applies for the certificate to be revoked, he must give at least 14 days' notice of the application to the bankrupt<sup>4</sup>. If the court revokes the certificate, it must forthwith give notice to the official receiver and the bankrupt<sup>5</sup>; and, if at the time of revocation there is a trustee other than the official receiver, the official receiver must send a copy of the court's notice to him<sup>6</sup>.

1    Ie a certificate issued under the Insolvency Act 1986 s 275(1), (2): see para 206 ante.

2    Ibid s 275(3). As to the modification of s 275 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1271.

3    Insolvency Rules 1986, SI 1986/1925, r 6.50(1). For the prescribed form of revocation of certificate of summary administration see rr 6.50, 12.7(1), (2), Sch 4, Form 6.31.

4    Ibid r 6.50(2).

5    Ibid r 6.50(3).

6    Ibid r 6.50(4).

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **206-209 Summary Administration**

Provisions of Insolvency Act 1986 concerning summary administration repealed: Enterprise Act 2002 Schs 23, 26.

### **209 Revocation of certificate of summary administration**

TEXT AND NOTES 1, 2--Repealed: Enterprise Act 2002 Sch 23 para 2, Sch 26.

TEXT AND NOTES 3-6--Revoked: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/(iii) Register of Bankruptcy Orders/210. Register of bankruptcy orders.

### (iii) Register of Bankruptcy Orders

#### 210. Register of bankruptcy orders.

The Secretary of State must maintain a register of bankruptcy orders ('the register') which must contain the specified bankruptcy information entered in it by the official receiver<sup>1</sup>, any information entered in it by the official receiver where he becomes aware of or receives notice of any changes<sup>2</sup> and the information set out in heads (1) and (2) below<sup>3</sup>. The register must be open to public inspection<sup>4</sup>.

The Secretary of State must cause to be entered in the register:

- 371 (1) notice of the making of an annulment order<sup>5</sup> which has been duly given<sup>6</sup> to him<sup>7</sup>;
- 372 (2) such of the specified bankruptcy information and notice of the making of any annulment order<sup>8</sup> relating to any bankruptcy order where such bankruptcy order was made in the period of five years prior to 22 March 1999 as is in the possession of the Secretary of State on that date but excluding information relating to:
  - 19 24. (a) any bankruptcy order which has been annulled<sup>9</sup> or which has been rescinded<sup>10</sup>;
  25. (b) any bankruptcy order which has been annulled<sup>11</sup> more than two years prior to 22 March 1999; and
  26. (c) any bankruptcy order in respect of which an order<sup>12</sup> is in force on that date and a copy of which has been delivered to the official receiver<sup>13</sup>, provided that, where after that date the order<sup>14</sup> expires, the Secretary of State must enter in the register such of the specified bankruptcy information relating to the bankruptcy order previously the subject of the order<sup>14</sup> as is in his possession as at the date of expiry of such order, except where the official receiver receives a copy of any further order of the court<sup>14</sup> in respect of such bankruptcy order, in which event the Secretary of State must not enter such specified bankruptcy information in the register until the expiry of such further order<sup>15</sup>.

20

Where a bankrupt in respect of whom specified bankruptcy information has been entered in the register is discharged from the bankruptcy or obtains an annulment order<sup>16</sup> in respect of the bankruptcy order, the Secretary of State must, on the expiry of two years after the date of such discharge or annulment order (or, where a certificate for the summary administration of the bankrupt's estate has been issued<sup>17</sup>, on the expiry of three years after the date on which the bankrupt is discharged from the bankruptcy), delete from the register the specified bankruptcy information and any other information entered in the register in respect of such bankruptcy order<sup>18</sup>.

If a bankruptcy order in respect of which specified bankruptcy information has been entered in the register is annulled by the court<sup>19</sup>, the Secretary of State must delete from the register the specified bankruptcy information and any other information entered in the register in respect of such bankruptcy order on receiving notice<sup>20</sup> of such annulment<sup>21</sup>.

If a bankruptcy order in respect of which specified bankruptcy information has been entered in the register is rescinded by the court<sup>22</sup>, the Secretary of State must delete from the register the

specified bankruptcy information and any other information entered in the register in respect of such bankruptcy order on receiving a copy of the order of the court rescinding the bankruptcy order<sup>23</sup>.

- 1    le in pursuance of the Insolvency Rules 1986, SI 1986/1925, r 6.223(B) (as added): see para 211 post. For the meaning of 'specified bankruptcy information' see para 211 post.
- 2    le in pursuance of ibid r 6.223(C) (as added): see para 212 post.
- 3    Ibid r 6.223(A)(1) (added by SI 1999/359).
- 4    Insolvency Rules 1986, SI 1986/1925, r 6.223(A)(7) (added by SI 1999/359).
- 5    le under the Insolvency Act 1986 s 261(1)(a) (see para 107 head (1) ante) or s 282(1)(b) (see para 610 head (2) post).
- 6    le in pursuance of the Insolvency Rules 1986, SI 1986/1925, r 6.213(2): see para 622
- 7    Ibid r 6.223(A)(2) (added by SI 1999/359).
- 8    See note 5 supra.
- 9    le under the Insolvency Act 1986 s 282(1)(a): see para 610 head (1) post.
- 10   le under ibid s 375 (as amended): see paras 739 post.
- 11   See note 5 supra.
- 12   le under the Insolvency Rules 1986, SI 1986/1925, r 6.34(3) (as amended) (see para 198 ante) or r 6.46(3) (as amended) (see para 204 ante).
- 13   le under r 6.34(4) (see para 198 post) or r 6.46(4) (see para 204 post).
- 14   See note 12 supra.
- 15   Insolvency Rules 1986, SI 1986/1925, r 6.223(A)(3) (added by SI 1999/359).
- 16   See note 5 supra.
- 17   le under the Insolvency Act 1986 s 275(1): see para 206 ante.
- 18   Insolvency Rules 1986, SI 1986/1925, r 6.223(A)(4) (added by SI 1999/359).
- 19   See note 9 supra.
- 20   le under the Insolvency Rules 1986, SI 1986/1925, r 6.213(2): see para 622 post.
- 21   Ibid r 6.223(A)(5) (added by SI 1999/359).
- 22   See note 10 supra.
- 23   Insolvency Rules 1986, SI 1986/1925, r 6.223(A)(6) (added by SI 1999/359).

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **210-212 Register of Bankruptcy Orders**

Revoked: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/(iii) Register of Bankruptcy Orders/211. Specified bankruptcy information.

## **211. Specified bankruptcy information.**

Following the receipt by the official receiver<sup>1</sup> of a copy of the bankruptcy order from the court, the official receiver must cause to be entered in the register<sup>2</sup> the information listed in head (a) below and must cause to be entered in the register the information listed in head (b) below on receipt by him of such information<sup>3</sup>.

Following the receipt by the official receiver:

- 373 (1) of notice of the revocation of a certificate for summary administration<sup>4</sup>;
- 374 (2) of a copy of an order suspending the bankrupt's discharge on the adjournment of a public examination<sup>5</sup>;
- 375 (3) of a copy of an order suspending the bankrupt's discharge on the official receiver's application<sup>6</sup>;
- 376 (4) of a copy of a certificate<sup>7</sup> certifying the discharge of an order suspending the running of the relevant period<sup>8</sup>;
- 377 (5) of a copy of an order discharging the bankrupt absolutely or subject to conditions<sup>9</sup>,

the official receiver must cause the information listed in head (c) below to be entered in the register<sup>10</sup>.

Where an order referred to in head (4) above is subsequently rescinded by the court, the official receiver must cause the specified bankruptcy information relating to such bankruptcy to be amended to record the fact that the bankrupt is not discharged and, where the information in respect of such bankruptcy has been deleted from the register<sup>11</sup>, must cause such information to be restored to the register<sup>12</sup>.

Where a bankrupt is discharged from bankruptcy on the expiration of the relevant period<sup>13</sup>, the official receiver must cause the fact and date of such discharge to be entered in the register<sup>14</sup>.

For these purposes, 'specified bankruptcy information' means:

- 378 (a) information being:
  - 21 27. (i) the specified matters<sup>15</sup> with respect to the debtor as stated in the bankruptcy petition; and
  - 22 28. (ii) the bankruptcy order date, the court and court reference number<sup>16</sup>;
- 23 379 (b) information being:
  - 29. (i) the name, gender, occupation (if any) and date of birth of the bankrupt;
  - 30. (ii) the bankrupt's last known address;
  - 31. (iii) where the bankrupt has been an undischarged bankrupt at any time in the period of 15 years ending with the date of the bankruptcy order in question, the date

- of the most recent of any previous bankruptcy orders, but excluding an order which has been annulled<sup>17</sup> or rescinded<sup>18</sup>;
32. (iv) any name by which the bankrupt is known other than his true name;
33. (v) the name or names in which he carries on business if other than his true name and any address at which he carries on business;
34. (vi) the contact address of the official receiver's office;
35. (vii) the name and address of the insolvency practitioner, where appointed;
36. (viii) the automatic discharge date<sup>19</sup> or, where applicable<sup>20</sup>, a statement that there is no automatic discharge date;
37. (ix) where a certificate for summary administration has been issued, a statement to that effect<sup>21</sup>; and
- 24  
380 (c) information being:
- 25
38. (i) the revised automatic discharge date where the court has revoked a certificate for the summary administration of a bankrupt's estate<sup>22</sup>, the court has made an order<sup>23</sup> that the relevant period<sup>23</sup> is to cease to run for the period specified in the order or the court has discharged an order<sup>23</sup> being satisfied that the relevant period should begin to run again;
39. (ii) a statement that discharge has been suspended where the court has made an order<sup>23</sup> that the relevant period<sup>23</sup> is to cease to run until the fulfilment of such conditions as may be specified in the order;
40. (iii) the fact that and date on which the bankrupt is discharged<sup>24</sup>.
- 26

1 le pursuant to the Insolvency Rules 1986, SI 1986/1925, r 6.34 (as amended) (see para 198 ante) or r 6.46 (as amended) (see para 204 ante).

2 For the meaning of 'the register' see para 210 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.223(B)(1) (added by SI 1999/359).

4 le pursuant to the Insolvency Rules 1986, SI 1986/1925, r 6.50(3): see para 209 ante.

5 le pursuant to *ibid* r 6.176(5) (as added): see para 300 post.

6 le pursuant to *ibid* r 6.215(6): see para 634 post.

7 le pursuant to *ibid* r 6.216(7) (as amended): see para 635 post.

8 le under the Insolvency Act 1986 s 279(3): see para 633 post.

9 le pursuant to the Insolvency Rules 1986, SI 1986/1925, r 6.219(3): see para 639 post.

10 *Ibid* r 6.223(B)(2) (added by SI 1999/359).

11 le pursuant to the Insolvency Rules 1986, SI 1986/1925, r 6.223(A)(4) (as added): see para 210 ante.

12 *Ibid* r 6.223(B)(3) (added by SI 1999/359).

13 le under the Insolvency Act 1986 s 279(1)(b): see para 631 post.

14 Insolvency Rules 1986, SI 1986/1925, r 6.223(B)(4) (added by SI 1999/359).

15 le the matters listed in the Insolvency Rules 1986, SI 1986/1925, r 6.7 (see para 161 ante) and r 6.38 (see para 189 ante).

16 *Ibid* r 6.223(B)(5)(a) (added by SI 1999/359).

17 le under the Insolvency Act 1986 s 282(1)(a): see para 610 head (1) post.



- 18    le under *ibid* s 375 (as amended): see para 739 post.
- 19    See note 13 *supra*.
- 20    le where the Insolvency Act 1986 s 279(1)(a) applies: see para 857 post.
- 21    Insolvency Rules 1986, SI 1986/1925, r 6.223(B)(5)(b) (added by SI 1999/359).
- 22    le under the Insolvency Act 1986 s 275(3): see para 209 ante.
- 23    le under *ibid* s 279(3): see para 631 post.
- 24    Insolvency Rules 1986, SI 1986/1925, r 6.223(B)(5)(c) (added by SI 1999/359).

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **210-212 Register of Bankruptcy Orders**

Revoked: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/(iii) Register of Bankruptcy Orders/212. Notification of changes.

### **212. Notification of changes.**

If the official receiver becomes aware that the information which has been entered in the register<sup>1</sup> is inaccurate, he must rectify the information entered in the register<sup>2</sup>.

If the official receiver receives notice of the date of death of a bankrupt in respect of whom specified bankruptcy information<sup>3</sup> has been entered in the register, he must cause such date to be entered in the register<sup>4</sup>.

- 1    For the meaning of 'the register' see para 210 ante.
- 2    Insolvency Rules 1986, SI 1986/1925, r 6.223(C)(1) (added by SI 1999/359).
- 3    For the meaning of 'specified bankruptcy information' see para 211 ante.
- 4    Insolvency Rules 1986, SI 1986/1925, r 6.223(C)(2) (added by SI 1999/359).

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **210-212 Register of Bankruptcy Orders**

Revoked: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/(iv) Commencement and Duration of Bankruptcy Orders/213. Commencement and duration of bankruptcy order.

### **(iv) Commencement and Duration of Bankruptcy Orders**

#### **213. Commencement and duration of bankruptcy order.**

The bankruptcy of an individual against whom a bankruptcy order has been made:

- 381 (1) commences with the day on which the order is made; and
- 382 (2) continues until the individual is discharged under the statutory provisions<sup>1</sup>.

<sup>1</sup> Insolvency Act 1986 s 278. The statutory provisions referred to are ss 279-282 (see para 629 et seq post): s 278.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the bankruptcy of an individual commences with the day on which the insolvency administration order is made: s 278 (amended by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 10). As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

### **UPDATE**

#### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/(v) Other Cases for Special Consideration/214. Default in connection with voluntary arrangement.

### **(v) Other Cases for Special Consideration**

#### **214. Default in connection with voluntary arrangement.**

The court may not make a bankruptcy order on a petition<sup>1</sup> by the supervisor of, or a person bound by, a voluntary arrangement proposed and approved under Part VIII of the Insolvency Act 1986<sup>2</sup> unless it is satisfied:

- 383 (1) that the debtor has failed to comply with his obligations under the voluntary arrangement<sup>3</sup>; or
- 384 (2) that information which was false or misleading in any material particular or which contained material omissions was contained in any statement of affairs<sup>4</sup> or other document supplied by the debtor, or was otherwise made available by the debtor to his creditors at or in connection with a meeting of creditors summoned under the statutory provisions<sup>5</sup>; or
- 385 (3) that the debtor has failed to do all such things as may for the purposes of the voluntary arrangement have been reasonably required of him by the supervisor of the arrangement<sup>6</sup>.

Where a bankruptcy order is made on such a petition, any expenses properly incurred as expenses of the administration of the voluntary arrangement in question are a first charge on the bankrupt's estate<sup>7</sup>.

1 le under the Insolvency Act 1986 s 264(1)(c): see para 124 head (3) ante.

2 le under ibid Pt VIII (ss 252-263): see para 81 et seq ante.

3 See *Vadher v Weisgard* [1997] BCC 219, [1998] BPIR 295 (debtor's failure to co-operate); *Carter-Knight v Peat* [2000] BPIR 968 (bankruptcy order made where there were serious breaches of the debtor's obligations, even though these had been remedied by the date of the hearing).

4 As to the statement of affairs see para 93 ante.

5 le summoned under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante. Information will be false or misleading in a material way if, had the true position been given, it would have been likely to make a material difference to the way in which creditors would have considered and assessed the proposals: *Re Tack* [2000] BPIR 164. Secret arrangements between creditors to which the debtor is privy may constitute a material omission if they are not disclosed: *Cadbury Schweppes plc v Somji* [2001] 1 WLR 615, sub nom *Somji v Cadbury Schweppes plc* [2001] BCLC 498, CA.

6 Insolvency Act 1986 s 276(1).

7 Ibid s 276(2). For the meaning of 'the bankrupt's estate' see para 216 post. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 276(2) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 8. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## UPDATE

### 195-215 Bankruptcy orders; summary administration

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(8) BANKRUPTCY ORDERS; SUMMARY ADMINISTRATION/(v) Other Cases for Special Consideration/215. Petition based on criminal bankruptcy order.

### 215. Petition based on criminal bankruptcy order.

The court must<sup>1</sup> make a bankruptcy order on a petition by the Official Petitioner or any person specified in the order in pursuance of the Powers of Criminal Courts Act 1973<sup>2</sup> where a criminal bankruptcy order has been made against the individual on production of a copy of the criminal bankruptcy order on which the petition is based; but this provision does not apply if it appears to the court that the criminal bankruptcy order has been rescinded on appeal<sup>3</sup>.

1 le subject to the Insolvency Act 1986 s 266(3): see para 124 ante.

2 le a petition under ibid s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 post; and as to the repeal of the Powers of Criminal Courts Act 1973 s 39 (as amended) see para 844 note 1 post.

3 Insolvency Act 1986 s 277(1). Subject to the provisions of Pt IX (ss 264-371) (as amended), the fact that an appeal is pending against any conviction by virtue of which a criminal bankruptcy order was made does not affect any proceedings on a petition under s 264(1)(d) based on that order: s 277(2). For the purposes of s 277, an appeal is pending: (1) in any case, until the expiration of the period of 28 days beginning with the day of conviction; and (2) if notice of appeal to the Court of Appeal is given during that period and during that period the appellant notifies the official receiver of it, until the determination of the appeal and thereafter for so long as an appeal to the House of Lords is pending within the meaning of the Powers of Criminal Courts Act 1973 s 40(5) (repealed): Insolvency Act 1986 s 277(3). As to criminal bankruptcy orders see para 844 et seq post; and as to the prospective repeal of s 277 see para 844 note 2 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 277 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 9. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## **UPDATE**

### **195-215 Bankruptcy orders; summary administration**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **215 Petition based on criminal bankruptcy order**

NOTE 3--Insolvency Act 1986 s 277(3) amended: Constitutional Reform Act 2005 Sch 9 para 44 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(i) In general/216. Meaning of 'bankrupt's estate'.

## **(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS**

### **(i) In general**

#### **216. Meaning of 'bankrupt's estate'.**

A bankrupt's estate for the purposes of the Insolvency Act 1986<sup>1</sup> comprises:

- 386 (1) all property<sup>2</sup> belonging to or vested in the bankrupt at the commencement of the bankruptcy<sup>3</sup>; and
- 387 (2) any property which, by virtue of any of the provisions of the 1986 Act<sup>4</sup>, is comprised in that estate or is treated as falling within head (1) above<sup>5</sup>.

The above provisions do not, however, apply to:

- 388 (a) such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business<sup>6</sup> or vocation<sup>7</sup>;
- 389 (b) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family<sup>8</sup>;
- 390 (c) property held by the bankrupt on trust for any other person<sup>9</sup>;
- 391 (d) the right of nomination to a vacant ecclesiastical benefice<sup>10</sup>;
- 392 (e) a tenancy which is an assured tenancy<sup>11</sup> or assured agricultural occupancy<sup>12</sup> and the terms of which inhibit<sup>13</sup> an assignment<sup>14</sup>;
- 393 (f) a protected tenancy<sup>15</sup> in respect of which<sup>16</sup> no premium can lawfully be required as a condition of assignment<sup>17</sup>;
- 394 (g) a tenancy of a dwelling house by virtue of which the bankrupt is<sup>18</sup> a protected occupier of the dwelling house, and the terms of which inhibit<sup>19</sup> an assignment<sup>20</sup>; or
- 395 (h) a secure tenancy<sup>21</sup> which is not capable<sup>22</sup> of being assigned<sup>23</sup>.

References in the Insolvency Act 1986<sup>24</sup> to property, in relation to a bankrupt, include references to any power exercisable by him over or in respect of property, except in so far as the power is exercisable over or in respect of property not for the time being comprised in the bankrupt's estate and:

- 396 (i) is so exercisable at a time after either the official receiver has had his release in respect of that estate<sup>25</sup> or a meeting summoned by the trustee of that estate<sup>26</sup> has been held; or
- 397 (ii) cannot be so exercised for the benefit of the bankrupt;

and a power exercisable over or in respect of property is deemed<sup>27</sup> to vest in the person entitled to exercise it at the time of the transaction or event by virtue of which it is exercisable by that person, whether or not it becomes so exercisable at that time<sup>28</sup>.

For these purposes<sup>29</sup>, property comprised in a bankrupt's estate is so comprised subject to the rights of any person other than the bankrupt, whether as a secured creditor<sup>30</sup> of the bankrupt or otherwise, in relation thereto, but disregarding any rights in relation to which a statement<sup>31</sup> by a secured creditor was made in the petition on which the bankrupt was adjudged bankrupt, and any rights which have been otherwise given up in accordance with the Insolvency Rules 1986<sup>32</sup>.

The above provisions have effect subject to the provisions of any enactment not contained in the Insolvency Act 1986 under which any property is to be excluded from a bankrupt's estate<sup>33</sup>.

1 le for the purposes of any of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

2 As to the types of property comprised in the bankrupt's estate which vest in a trustee see para 390 et seq post.

3 As to the commencement of bankruptcy see para 213 ante.

4 le for the purposes of any of the provisions of the Insolvency Act 1986 ss 284-371 (as amended).

5 Ibid s 283(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 283 (as amended) applies with the modifications: (1) that it has effect as if the petition had been presented and the insolvency administration order had been made

on the date of death of the deceased debtor (Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 12); (2) that in the Insolvency Act 1986 s 283(2)(b) (see text head (b) *infra*) for the words 'bankrupt and his family' there are to be substituted the words 'family of the deceased debtor' (Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12(a)); and (3) references in any of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) to property, in relation to a deceased debtor, include the capacity to exercise and take proceedings for exercising all such powers over or in respect of property as might have been exercised by his personal representative for the benefit of the estate on the date of the insolvency administration order and as are specified in s 283(4) (see *infra*) (s 283(4A) (added by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12(b))). As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 *et seq post*.

As to the modification of the Insolvency Act 1986 s 283 (as amended) by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 *post*; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1250, 1272.

6 For the meaning of 'business' see para 81 note 4 *ante*.

7 Insolvency Act 1986 s 283(2)(a). Section 283(2) is subject to s 308 (as amended) (see para 392 *post*): s 283(2). As to the modifications which apply in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see note 5 *supra*.

8 *Ibid* s 283(2)(b). See also note 5 *supra*. For these purposes, 'family', in relation to a bankrupt, means the persons, if any, who are living with him and are dependent on him: s 385(1).

9 *Ibid* s 283(3)(a).

10 *Ibid* s 283(3)(b).

11 *Ie* within the meaning of the Housing Act 1988 Pt 1 (ss 1-45) (as amended): see LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 1018.

12 *Ie* within the meaning of *ibid* Pt 1 (ss 1-45) (as amended): see LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 1183.

13 *Ie* as mentioned in the Rent Act 1977 s 127(5) (as amended): see LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 929.

14 Insolvency Act 1986 s 283(3A)(a) (added by the Housing Act 1988 s 117(1)). The Insolvency Act 1986 s 283(3A) (as added) is subject to s 308A (as added) (see para 393 *post*): s 283(3A) (added by the Housing Act 1988 s 117(1)).

15 *Ie* within the meaning of the Rent Act 1977: see LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 818.

16 *Ie* by virtue of any provision of *ibid* Pt IX (ss 119-128) (as amended): see LANDLORD AND TENANT vol 27(2) (2006 Reissue) paras 925 *et seq*, 998.

17 Insolvency Act 1986 s 283(3A)(b) (added by the Housing Act 1988 s 117(1)). See also note 14 *supra*.

18 *Ie* within the meaning of the Rent (Agriculture) Act 1976: see LANDLORD AND TENANT vol 27(2) (2006 Reissue) paras 1144-1145.

19 See note 13 *supra*.

20 Insolvency Act 1986 s 283(3A)(c) (added by the Housing Act 1988 s 117(1)). See also note 14 *supra*.

21 *Ie* within the meaning of the Housing Act 1985 Pt IV (ss 79-117) (as amended): see LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 1300 *et seq*.

22 *Ie* except in the cases mentioned in *ibid* s 91(3): see LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 1323.

23 Insolvency Act 1986 s 283(3A)(d) (added by the Housing Act 1988 s 117(1)). See also note 14 *supra*.

24 *Ie* in any of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

25 *Ie* under *ibid* s 299(2): see para 377 *post*.

26 *Ie* under *ibid* s 331: see para 606 *post*.

- 27 le for the purposes of *ibid* Pts VIII-XI (ss 252-385) (as amended).
- 28 *Ibid* s 283(4). As to the modifications which apply in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see note 5 *supra*; and para 404 *post*.
- 29 le for the purposes of any provision in *ibid* Pts VIII-XI (ss 252-385) (as amended).
- 30 For the meaning of 'secured creditor' see para 560 *post*.
- 31 le a statement such as is required by the Insolvency Act 1986 s 269(1)(a): see para 126 note 7 *head* (1) *ante*.
- 32 *Ibid* s 283(5).
- 33 *Ibid* s 283(6). In general social security payments, pensions and analogous benefits are expressed to be inalienable, and not to pass to the trustee in bankruptcy or any other person acting on behalf of the recipient's creditors: see *eg*:
  - 54 (1) the Local Government Superannuation Act 1937 s 23 and the Local Government Superannuation Act 1953 (both these last-named enactments were repealed by the Superannuation Act 1972 s 29(4), Sch 8, but, by virtue of s 29(2), Sch 7 para 5, Table, they have effect as provisions of regulations under s 7 or s 8(2); and see Sch 3 para 9) (see *LOCAL GOVERNMENT* vol 69 (2009) PARA 1 *et seq*);
  - 55 (2) the Superannuation Act 1972 s 5 (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 19(b); the Bankruptcy (Scotland) Act 1985 s 75(1), Sch 7 para 9; the Insolvency Act 1986 s 439(2), Sch 14) (see *SOCIAL SECURITY AND PENSIONS* vol 44(2) (Reissue) para 875);
  - 56 (3) the National Health Service (Compensation) Regulations 1974, SI 1974/1748, reg 40(1) (see *HEALTH SERVICES* vol 54 (2008) PARA 712);
  - 57 (4) the Police Pensions Act 1976 s 9 (see *POLICE* vol 36(1) (2007 Reissue) para 412);
  - 58 (5) the Firemen's Pension Scheme Order 1992, SI 1992/129, art 2(2), Sch 2 r L5(5) (see *FIRE SERVICES* vol 18(2) (Reissue) para 56);
  - 59 (6) the Social Security Administration Act 1992 s 187(1) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 72) (see *SOCIAL SECURITY AND PENSIONS*);
  - 60 (7) the Merchant Shipping Act 1995 s 34 (see *SHIPPING AND MARITIME LAW* vol 93 (2008) PARA 471);
  - 61 (8) the Local Government Pension Scheme Regulations 1997, SI 1997/1612, reg 96(3) (see *LOCAL GOVERNMENT* vol 69 (2009) PARA 451);
  - 62 (9) the National Health Service Pension Scheme Regulations 1995, SI 1995/300, reg T3 (see *HEALTH SERVICES* vol 54 (2008) PARA 739);
  - 63 (10) the Teachers' (Compensation for Redundancy and Premature Retirement) Regulations 1997, SI 1997/311, reg 27(2) (see *EDUCATION* vol 15(2) (2006 Reissue) para 871);
  - 64 (11) the Teachers' Pensions Regulations 1997, SI 1997/3001, reg E35(4) (see *EDUCATION* vol 15(2) (2006 Reissue) para 868);
  - 65 (12) the Welfare Reform and Pensions Act 1999 ss 11, 12 and the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836 (see para 395 *post*); and
  - 66 (13) the Education (Student Support) Regulations 2001, SI 2001/951, reg 40(1) (cited in para 445 note 7 *post*).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **216 Meaning of 'bankrupt's estate'**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTES 7-23--In specified circumstances, the bankrupt's home does not form part of the bankrupt's estate: see PARA 216A.

NOTE 32--A bankrupt's estate is subject to a wife's equitable interest in the matrimonial home conferred by a property adjustment order on the making of a decree absolute of divorce: *Mountney v Treharne* [2002] EWCA Civ 1174, [2002] 3 WLR 1760.

NOTE 33--Head (5). See also Firefighters' Pension Scheme (England) Order 2006, SI 2006/3432; Firefighters' Pension Scheme (Wales) Order 2007, SI 2007/1072; and FIRE SERVICES vol 18(2) (Reissue) PARA 45-58.

Head (8). Local Government Pension Scheme Regulations 1997, SI 1997/1612, reg 96(3) replaced by Local Government Pension Scheme (Administration) Regulations 2008, SI 2008/239, reg 53(3).

Head (13). SI 2001/951 now replaced by the Education (Student Support) Regulations 2009, SI 2009/1555 (see EDUCATION vol 15(2) (2006 Reissue) PARA 1046). See also Assembly Learning Grants and Loans (Higher Education) (Wales) (No 2) Regulations 2008, SI 2008/3170 (amended by SI 2009/470, SI 2009/2156, SI 2009/2737), replaced on 1 September 2010 by Assembly Learning Grants and Loans (Higher Education) (Wales) Regulations 2008, SI 2009/2737, and EDUCATION vol 15(2) (2006 Reissue) PARA 1046.

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### **216A. Bankrupt's home ceasing to form part of estate.**

Where property comprised in the bankrupt's estate consists of an interest in a dwelling house which at the date of the bankruptcy was the sole or principal residence of the bankrupt<sup>1</sup>, the bankrupt's spouse or civil partner<sup>2</sup>, or a former spouse or former civil partner of the bankrupt<sup>3</sup>, at the end of the period of three years<sup>4</sup> beginning with the date of the bankruptcy that interest ceases to be comprised in the bankrupt's estate<sup>5</sup>, and vests in the bankrupt, without conveyance, assignment or transfer<sup>6</sup>.

The above provisions do not apply if during the period of three years beginning with the date of the bankruptcy<sup>7</sup> (1) the trustee realises the interest in the dwelling house<sup>8</sup>, (2) the trustee applies for an order for sale in respect of the dwelling house<sup>9</sup>, (3) the trustee applies for an order for possession of the dwelling house<sup>10</sup>, (4) the trustee applies for an order imposing a charge on the dwelling house for the benefit of the bankrupt's estate<sup>11</sup> in respect of that interest<sup>12</sup>, or (5) the trustee and the bankrupt agree that the bankrupt is to incur a specified



liability to his estate, with or without the addition of interest from the date of the agreement, in consideration of which the interest in the dwelling house will cease to form part of the estate<sup>13</sup>.

If the bankrupt does not inform the trustee or the official receiver of his interest in a property before the end of the period of three months beginning with the date of the bankruptcy, the period of three years beginning with the date of the bankruptcy<sup>14</sup> does not begin with the date of the bankruptcy<sup>15</sup>, but begins with the date on which the trustee or official receiver becomes aware of the bankrupt's interest<sup>16</sup>.

The rules<sup>17</sup> may make provision for the above provisions to have effect with the substitution of a shorter period for the period of three years beginning with the date of the bankruptcy<sup>18</sup> in specified circumstances, which may be described by reference to action to be taken by a trustee in bankruptcy<sup>19</sup>.

Transitional provisions apply in relation to an individual who is adjudged bankrupt on a petition presented before the above provisions come into force<sup>20</sup>.

1 Insolventy Act 1986 s 283A(1)(a) (s 283A added by Enterprise Act 2002 s 261(1)).

2 1986 Act s 283A(1)(b) (amended by Civil Partnership Act 2004 Sch 27 para 113(a)).

3 1986 Act s 283A(1)(c) (amended by 2004 Act Sch 27 para 113(b)).

4 The court may substitute for this period a longer period in prescribed circumstances, and in such other circumstances as it thinks appropriate: 1986 Act s 283A(6). 'Prescribed' means prescribed by the rules; and 'the rules' means rules made under s 412: s 384(1) (see further PARA 200).

5 Ibid s 283A(2)(a).

6 Ibid s 283A(2)(b).

7 Ie the period mentioned in TEXT AND NOTE 4.

8 1986 Act s 283A(3)(a). 'Realise' does not include effecting a sale for future cash consideration at the stage before such cash is actually received: *Lewis v Metropolitan Property Realisation Ltd* [2009] EWCA Civ 448, [2009] 4 All ER 141 (distinction to be made between concepts of sale and realisation and differing significance of trustee in bankruptcy's powers and limits placed on exercise thereof).

9 1986 Act s 283A(3)(b).

10 Ibid s 283A(3)(c).

11 Ie an order under ibid s 313: see PARA 401.

12 Ibid s 283A(3)(d).

13 Ibid s 283A(3)(e). Where an application of a kind described in heads (2)-(4) in the text is made during the period of three years beginning with the date of the bankruptcy (ie the period mentioned in TEXT AND NOTE 4) and is dismissed, unless the court orders otherwise the interest to which the application relates will on the dismissal of the application cease to be comprised in the bankrupt's estate, and vest in the bankrupt, without conveyance, assignment or transfer: s 283A(4).

14 Ie the period mentioned in TEXT AND NOTE 4.

15 1986 Act s 283A(5)(a).

16 Ibid s 283A(5)(b).

17 Ie rules made under ibid s 412: see NOTE 4.

18 Ie the period mentioned in TEXT AND NOTE 4.

19 1986 Act s 283A(7). The rules may also, in particular, make provision (1) requiring or enabling the trustee of a bankrupt's estate to give notice that s 283A applies or does not apply; (2) about the effect of a notice under head (1); (3) requiring the trustee of a bankrupt's estate to make an application to the Chief Land Registrar: s

283A(8). Rules under head (2) may, in particular (a) disapply s 283A; (b) enable a court to disapply s 283A; (c) make provision in consequence of a disapplication of s 283A; (d) enable a court to make provision in consequence of a disapplication of s 283A; (e) make provision, which may include provision conferring jurisdiction on a court or tribunal, about compensation: s 283A(9).

20 See the Enterprise Act 2002 s 261(7)-(10). Section 261(7)-(10) only apply to bankruptcies made under the 1986 Act: *Pannell v The Official Receiver* [2008] EWHC 736 (Ch), [2008] BPIR 629.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### 217. Restrictions on disposition of property.

Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which the following provisions apply<sup>1</sup> is void except to the extent that it is or was made with the consent of the court, or is or was subsequently ratified by the court<sup>2</sup>. The above provisions apply to a payment, whether in cash or otherwise, as it applies to a disposition of property and, accordingly, where any payment is void by virtue of the above provisions, the person paid must hold the sum for the bankrupt as part of his estate<sup>3</sup>.

The above provisions do not give a remedy against any person:

- 398 (1) in respect of any property or payment which he received before the commencement of the bankruptcy in good faith<sup>4</sup>, for value and without notice that the petition had been presented; or
- 399 (2) in respect of any interest in property which derives from an interest in respect of which there is, by virtue of these provisions, no remedy<sup>5</sup>.

Where, after commencement of his bankruptcy<sup>6</sup>, the bankrupt has incurred a debt to a banker or other person by reason of the making of a payment which is void, that debt is deemed<sup>7</sup> to have been incurred before the commencement of the bankruptcy unless that banker or person had notice of the bankruptcy before the debt was incurred, or it is not reasonably practicable for the amount of the payment to be recovered from the person to whom it was made<sup>8</sup>.

A disposition of property is void, notwithstanding that the property is not, or, as the case may be, would not be, comprised in the bankrupt's estate; but nothing in the above provisions affects any disposition made by a person of property held by him on trust for any other person<sup>9</sup>.

1 The Insolvency Act 1986 s 284 applies to the period beginning with the day of the presentation of the petition for the bankruptcy order (see para 160 et seq ante) and ending with the vesting, under Pt IX Ch IV (ss 305-335 (as amended): see para 390 et seq post), of the bankrupt's estate in a trustee: s 284(3). A claim by a trustee in bankruptcy against a third party in relation to foreign property transferred by the widow of a deceased bankrupt to that party is a claim in rem as to ownership, to which the law of lex situs of the property applies: *Re Hayward* [1997] Ch 45, [1997] 1 All ER 32.

2 Insolvency Act 1986 s 284(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 284 applies with the modification that it has effect as if the petition had been presented and the insolvency administration order had been made on the date of death of the deceased debtor and with the relevant modifications to s 283 (see para 216 note 5 ante): Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 12. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

As to the modification of the Insolvency Act 1986 s 284 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1251, 1273.

As to a transfer of property order made in divorce proceedings in respect of property held by a person against whom a bankruptcy petition has been presented see *Re Flint (a bankrupt)* [1993] Ch 319, [1993] 2 WLR 537; *Re Mordant, Mordant v Halls* [1997] 2 FCR 378, [1995] BCC 209 (affd [1996] BPIR 302 at 315, CA); *Beer v Higham* [1997] BPIR 349; *Harper v O'Reilly* [1998] 3 FCR 475, [1997] BPIR 656; *Burton v Burton* [1986] 2 FLR 419, [1986] Fam Law 330. Where assets of the bankrupt have been acquired by a third party for no consideration after commencement of the bankruptcy, the trustee is also entitled to the profits made from the use of those assets: see *Trustee of the Property of FC Jones & Sons (a firm) v Jones* [1997] Ch 159, [1996] 4 All ER 721, CA. As to the interpretation of the Insolvency Act 1986 s 284 generally see *Re Palmer (a debtor)* [1994] Ch 316, [1994] 3 All ER 835, CA; and see para 833 post. Cf the Insolvency Act 1986 s 127; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 700-702.

3 Ibid s 284(2).

4 Knowledge that a statutory demand has not been complied with could be held to constitute a lack of good faith in a purchaser who proceeds with a transaction with a debtor: see *Re Dalton (a bankrupt), ex p Herrington & Carmichael (a firm) v Trustee* [1963] Ch 336, [1962] 2 All ER 499, DC. As to statutory demands see para 154 et seq ante.

5 Insolvency Act 1986 s 284(4).

6 As to commencement of bankruptcy see para 213 ante.

7 Ie for the purposes of any of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

8 Ibid s 284(5). As to the liability of a bank in relation to payments made from an account in credit after the presentation of a petition see *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555, [2001] 1 All ER 289, CA. See further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 835, 847.

9 Insolvency Act 1986 s 284(6).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 217 Restrictions on disposition of property

NOTE 2--See *Treharne & Sand v Forrester* [2003] EWHC 2784 (Ch), [2004] 1 FLR 1173; and *Bateman v Hyde* [2009] EWHC 81 (Ch), [2009] BPIR 737.

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## 218. Restriction on proceedings and remedies.

At any time when proceedings on a bankruptcy petition are pending or an individual has been adjudged bankrupt, the court may stay any action, execution or other legal process against the property or person of the debtor, or, as the case may be, of the bankrupt<sup>1</sup>. Any court in which proceedings are pending against any individual may, on proof that a bankruptcy petition has been presented in respect of that individual or that he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit<sup>2</sup>.

After the making of a bankruptcy order, no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy<sup>3</sup>:

- 400 (1) has any remedy against the property or person of the bankrupt in respect of that debt; or
- 401 (2) may, before the discharge of the bankrupt<sup>4</sup>, commence any action or other legal proceedings against the bankrupt except with the permission of the court and on such terms as the court may impose<sup>5</sup>.

Where any goods of an undischarged bankrupt are held by any person by way of pledge, pawn or other security, the official receiver may, after giving notice in writing of his intention to do so, inspect the goods<sup>6</sup>. Where such a notice has been given to any person, that person is not entitled, without the permission of the court, to realise his security unless he has given the trustee of the bankrupt's estate a reasonable opportunity of inspecting the goods and of exercising the bankrupt's right of redemption<sup>6</sup>.

1 Insolvency Act 1986 s 285(1). For these purposes, references to the property or goods of the bankrupt are to any of his property or goods, whether or not comprised in his estate: s 285(6). For the meaning of 'or other legal process' see *Smith (a bankrupt) v Braintree District Council* [1990] 2 AC 215, [1989] 3 All ER 897, HL; *Re A Debtor (No 1 of 1987, Lancaster)*, ex p *Debtor v Royal Bank of Scotland plc* [1989] 2 All ER 46, sub nom *Re a Debtor (No 1 of 1987)* [1989] 1 WLR 271, CA.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 285 applies with the modification that it has effect as if the petition had been presented and the insolvency administration order had been made on the date of death of the deceased debtor and with the relevant modifications to s 283 (see para 216 note 5 ante): Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 12. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

2 Insolvency Act 1986 s 285(2). See *Re Smith (a bankrupt)*, ex p *Braintree District Council* [1990] 2 AC 215, [1989] 3 All ER 897, HL (a case under the General Rate Act 1967 (repealed)); *Re A Debtor (No 1 of 1987, Lancaster)*, ex p *Debtor v Royal Bank of Scotland plc* [1989] 2 All ER 46, sub nom *Re A Debtor (No 1 of 1987)* [1989] 1 WLR 271, CA; *Woodley v Woodley* [1993] 1 FCR 701, [1992] 2 FLR 417, CA; *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA; *Re a Debtor (784 of 1991)* [1992] Ch 554, [1992] 3 All ER 376. Where civil proceedings were said to be prejudicial to subsequent criminal proceedings, the court ordered all interlocutory applications to be heard in private: see *Polly Peck International plc v Nadir* [1992] BCLC 746.

3 As to debts provable in the bankruptcy see para 490 et seq post.

4 As to discharge from bankruptcy see para 629 et seq post.

5 Insolvency Act 1986 s 285(3). Section 285(3) is subject to s 346 (see para 678 et seq post) and s 347 (see para 686 et seq post): s 285(3). Forfeiture for non-payment of rent is not a remedy or a security within the meaning of s 285, and the landlord is not a secured creditor: *Razzaq v Pala* [1997] 1 WLR 1336, [1997] BPIR 726. Subject to the Insolvency Act 1986 s 285(5) (see infra), s 285(3) does not affect the right of a secured creditor (see para 560 post) of the bankrupt to enforce his security: s 285(4). The court has a discretion to allow a claimant to commence proceedings under s 285(3) when he has already served a claim form in the ordinary way against the bankrupt without realising that the latter was bankrupt: *Re Saunders (a bankrupt)*, *Re Bearman (a bankrupt)* [1997] Ch 60, [1997] 3 All ER 992. As to the principles on which permission will be granted see *Bristol & West Building Society v Trustee of the property of Back (a bankrupt)* [1998] 1 BCLC 485, sub nom *Bristol & West Building Society v Trustee of the property of Back (a bankrupt) and Melinek (a bankrupt)* [1997]

BCC 358 (application for permission after the commencement of proceedings); and see *Re Bank of Credit and Commerce International SA (No 4)* [1994] 1 BCLC 419; *National Bank of Kuwait v Menzies* [1994] 2 BCLC 306, CA. Cf the Insolvency Act 1986 s 130(2); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 893.

6 Ibid s 285(5).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 218 Restriction on proceedings and remedies

NOTE 5--See *Re Taylor (A Bankrupt)* [2006] EWHC 3029 (Ch), [2007] Ch 150.

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## (ii) Powers of Court in Bankruptcy

### 219. General control of court.

Every bankruptcy is under the general control of the court and the court has full power<sup>1</sup> to decide all questions of priorities and all other questions, whether of law or fact, arising in any bankruptcy<sup>2</sup>.

An undischarged bankrupt or a discharged bankrupt whose estate is still being administered<sup>3</sup> must<sup>4</sup> do all such things as he may be directed to do by the court for the purposes of his bankruptcy or, as the case may be, the administration of that estate<sup>5</sup>; and the official receiver may at any time apply to the court for a direction under this provision<sup>6</sup>.

If any person without reasonable excuse fails to comply with any obligation so imposed on him<sup>7</sup>, he is guilty of contempt of court and liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>8</sup>.

1 Ibid subject to the provisions of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

2 Ibid s 363(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 363 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post. The powers conferred by the Insolvency Act 1986 s 363(1) are wide; for decisions under the similar provision in the Bankruptcy Act 1914 s 105 (repealed) see *Re Colgate (a bankrupt), ex p Trustee of Property of Bankrupt* [1986] Ch 439, [1986] 1 All ER 419, CA (where, in default of a creditors' meeting to fix the trustee's remuneration, the court fixed it itself); *Upton v Taylor and Colley* [1999] BPIR 168, DC.

3 Ibid under the Insolvency Act 1986 Pt IX Ch IV (ss 305-355) (as amended).

4 Ibid without prejudice to any other provision of ibid Pts VIII-XI (ss 252-385) (as amended).

- 5 Ibid s 363(2).
- 6 Ibid s 363(3). As to the mode of application and the procedure see para 764 et seq post.
- 7 Ie by ibid s 363(2): see supra.
- 8 Ibid s 363(4). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq; and as to offences see para 707 et seq post. For the prescribed form of affidavit in support of an application for committal for contempt of court see the Insolvency Rules 1986, SI 1986/1925, rr 12.7(1), (2), Sch 4, Form 7.15 (substituted by SI 1991/495); and for the prescribed form of warrant of committal for contempt see the Insolvency Rules 1986, SI 1986/1925, Sch 4, Form 7.17.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **219 General control of court**

NOTE 8--SI 1986/1925 Sch 4 Forms 7.15, 7.17 revoked: SI 2010/686.

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### **220. Seizure of bankrupt's property.**

At any time after a bankruptcy order has been made<sup>1</sup>, the court may, on the application of the official receiver or the trustee of the bankrupt's estate<sup>2</sup>, issue a warrant authorising the person to whom it is directed to seize any property comprised in the bankrupt's estate which is, or any books, papers or records relating to the bankrupt's estate or affairs<sup>3</sup> which are, in the possession or under the control of the bankrupt or any other person who is required to deliver the property, books, papers or records to the official receiver or trustee<sup>4</sup>.

Any person executing such a warrant may, for the purpose of seizing any property comprised in the bankrupt's estate or any books, papers or records relating to the bankrupt's estate or affairs, break open any premises where the bankrupt or anything that may be seized under the warrant is or is believed to be and any receptacle of the bankrupt which contains or is believed to contain anything that may be so seized<sup>5</sup>.

If, after a bankruptcy order has been made, the court is satisfied that any property comprised in the bankrupt's estate is, or any books, papers or records relating to the bankrupt's estate or affairs are, concealed in any premises not belonging to him, it may issue a warrant authorising any constable or prescribed officer<sup>6</sup> of the court to search those premises for the property, books, papers or records<sup>7</sup>. A warrant so issued to search premises not belonging to the bankrupt must authorise any person executing it to seize any property of the bankrupt found as a result of the execution of the warrant<sup>8</sup>.

Any property seized under a warrant issued under the above provisions<sup>9</sup> must be:

- 402 (1) lodged with, or otherwise dealt with as instructed by, whoever is specified in the warrant as authorised to receive it; or  
 403 (2) kept by the officer seizing it pending the receipt of written orders from the court as to its disposal,

as may be directed by the warrant<sup>10</sup>.

- 1 As to bankruptcy orders see para 195 et seq ante.  
 2 For the meaning of 'the bankrupt's estate' see para 216 ante.  
 3 For the meaning of references to a person's affairs see para 81 note 4 ante.  
 4 Insolvency Act 1986 s 365(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 365 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.  
 5 Insolvency Act 1986 s 365(2).  
 6 The person referred to in ibid s 365(3) as the prescribed officer of the court is: (1) in the case of the High Court, the tipstaff and his assistants of the court; and (2) in the case of a county court, the district judge and the bailiffs: Insolvency Rules 1986, SI 1986/1925, r 7.21(2); Courts and Legal Services Act 1990 s 74(1)(a).  
 7 Insolvency Act 1986 s 365(3). A warrant under s 365(3) may not be executed except in the prescribed manner and in accordance with its terms: s 365(4). As to execution of warrants generally see the Insolvency Rules 1986, SI 1986/1925, r 7.21; and para 726 post.  
 8 Ibid r 7.25(1).  
 9 It is issued under the Insolvency Act 1986 s 365(2) or (3): see supra.  
 10 Insolvency Rules 1986, SI 1986/1925, r 7.25(2). For the prescribed forms of warrant see rr 7.25, 12.7(1), (2), Sch 4, Form 7.12 (warrant of seizure of property), Form 7.13 (search warrant).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 220 Seizure of bankrupt's property

NOTE 10--SI 1986/1925 Sch 4 Forms 7.12, 7.13 revoked: SI 2010/686.

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### 221. Power of arrest.

The court may cause a warrant to be issued to a constable or prescribed officer<sup>1</sup> of the court:

- 404 (1) for the arrest of a debtor to whom a bankruptcy petition relates or of an undischarged bankrupt, or of a discharged bankrupt whose estate is still being administered<sup>2</sup>; and
- 405 (2) for the seizure of any books, papers, records<sup>3</sup>, money or goods in the possession of a person arrested under the warrant,

and may authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held, in accordance with the Insolvency Rules 1986<sup>4</sup>, until such time as the court may order<sup>5</sup>.

The powers so conferred are exercisable in relation to a debtor or undischarged or discharged bankrupt if, at any time after the presentation of the bankruptcy petition relating to him or the making of the bankruptcy order against him, it appears to the court:

- 406 (a) that there are reasonable grounds for believing that he has absconded, or is about to abscond, with a view to avoiding or delaying the payment of any of his debts or his appearance to a bankruptcy petition or to avoiding, delaying or disrupting any proceedings in bankruptcy against him or any examination of his affairs<sup>6</sup>; or
- 407 (b) that he is about to remove his goods with a view to preventing or delaying possession being taken of them by the official receiver or the trustee of his estate; or
- 408 (c) that there are reasonable grounds for believing that he has concealed or destroyed, or is about to conceal or destroy, any of his goods or any books, papers or records which might be of use to his creditors in the course of his bankruptcy or in connection with the administration of his estate; or
- 409 (d) that he has, without the permission of the official receiver or the trustee of his estate, removed any goods in his possession which exceed in value the prescribed sum<sup>7</sup>; or
- 410 (e) that he has failed, without reasonable excuse, to attend any examination ordered by the court<sup>8</sup>.

When a person is arrested under a warrant issued under the above provisions:

- 411 (i) the officer apprehending him must give him into the custody of the governor of the prison named in the warrant, who must keep him in custody until such time as the court otherwise orders and must produce him<sup>9</sup> before the court as it may from time to time direct; and
- 412 (ii) any property in the arrested person's possession which may be seized must be lodged with, or otherwise dealt with as instructed by, whoever is specified in the warrant as authorised to receive it, or kept by the officer seizing it pending the receipt of written orders from the court as to its disposal, as may be directed by the court in the warrant<sup>10</sup>.

1 The person referred to in the Insolvency Act 1986 s 364(1) as the prescribed officer of the court is: (1) in the case of the High Court, the tipstaff and his assistants of the court; and (2) in the case of a county court, the district judge and the bailiffs: Insolvency Rules 1986, SI 1986/1925, r 7.21(2); Courts and Legal Services Act 1990 s 74(1)(a).

2 Ie under the Insolvency Act 1986 Pt IX Ch IV (ss 305-335) (as amended).

3 For the meaning of 'records' see para 21 note 11 ante.

4 Ie the Insolvency Rules 1986, SI 1986/1925 (as amended): see infra.



5 Insolvency Act 1986 s 364(1). As to the execution of warrants of arrest in other parts of the United Kingdom see s 426(7) and para 728 post; and as to the execution of warrants outside the court's district see the Insolvency Rules 1986, SI 1986/1925, r 7.24 and para 727 post. As to the execution of warrants generally see r 7.21; and para 726 post.

6 For the meaning of references to a person's affairs see para 81 note 4 ante.

7 For these purposes, the sum so prescribed is £500: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 3, Schedule Pt II. As to the Secretary of State's power to prescribe monetary limits see para 22 ante.

8 Insolvency Act 1986 s 364(2).

9 For the prescribed form of order for the production of a person arrested under the Insolvency Act 1986 s 364 see the Insolvency Rules 1986, SI 1986/1925, rr 7.22, 12.7(1), (2), Sch 4, Form 7.9 (substituted by SI 1987/1919).

10 Insolvency Rules 1986, SI 1986/1925, r 7.22. For the prescribed form of warrant of arrest see rr 7.22, 12.7(1), (2), Sch 4, Form 7.7.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### 221 Power of arrest

NOTE 5--See *Hickling v Baker* [2007] EWCA Civ 287, [2007] 4 All ER 390.

NOTE 7--The amount is now £1,000: SI 1986/1996 Schedule Pt II (substituted by SI 2004/547). SI 1986/1996 art 3 amended: SI 2009/465.

NOTE 9, 10--SI 1986/1925 Sch 4 Forms 7.7, 7.9 revoked: SI 2010/686.

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### (iii) Interim Receiver

#### 222. Interim receiver to be insolvency practitioner.

A person who acts as interim receiver must be qualified to act as an insolvency practitioner in relation to the individual<sup>1</sup>.

1 Insolvency Act 1986 s 388(2)(a). As to insolvency practitioners and their qualification see para 42 et seq ante. Nothing in s 388 (as amended) applies to anything done by the official receiver: see s 388(5)(a) (substituted by the Bankruptcy (Scotland) Act 1993 s 11(1)); and para 43 ante. As to the application of the Insolvency Act 1986 s 388 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 43 note 1 ante.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 222 Interim receiver to be insolvency practitioner

NOTE 1--Nothing in the 1986 Act s 388 applies to anything done (whether in the United Kingdom or elsewhere) in relation to insolvency proceedings under EC Council Regulation 1346/2000 in a member state other than the United Kingdom: 1986 Act s 388(6) (added by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240).

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### 223. Power to appoint.

If it is shown to be necessary for the protection of the debtor's property<sup>1</sup>, the court may, at any time after the presentation of a bankruptcy petition<sup>2</sup> and before making a bankruptcy order<sup>3</sup>, appoint the official receiver to be interim receiver of the debtor's property<sup>4</sup>.

Where the court has, on a debtor's petition, appointed an insolvency practitioner to inquire into the debtor's affairs<sup>5</sup> and it is shown to the court to be necessary for the protection of the debtor's property as mentioned above<sup>6</sup>, the court may, without making a bankruptcy order, appoint that practitioner, instead of the official receiver, to be interim receiver of the debtor's property<sup>7</sup>.

1 For these purposes, references to the debtor's property are to all his property, whether or not it would be comprised in his estate if he were adjudged bankrupt: Insolvency Act 1986 s 286(8).

2 As to bankruptcy petitions see para 124 et seq ante.

3 As to bankruptcy orders see para 195 et seq ante.

4 Insolvency Act 1986 s 286(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 286(1), (3)-(8) (see note 1 supra; and para 225 et seq post) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 13. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 Ie under the Insolvency Act 1986 s 273: see para 200 et seq ante.

6 Ie as mentioned in ibid s 286(1): see supra.

7 Ibid s 286(2).

## UPDATE

## **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **223 Power to appoint**

NOTE 7--See *Rio Properties Inc v Gibson Dunn & Crutcher* [2004] 1 WLR 2702, CA (challenge to appointment of licensed insolvency practitioner dismissed).

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### **224. Application for appointment.**

An application to the court for the appointment of an interim receiver<sup>1</sup> may be made by a creditor or by the debtor or by an insolvency practitioner appointed<sup>2</sup> to inquire into the debtor's affairs<sup>3</sup>.

The application must be supported by an affidavit<sup>4</sup> stating:

- 413 (1) the grounds on which it is proposed that the interim receiver should be appointed;
- 414 (2) whether or not the official receiver has been informed of the application and, if so, has been furnished with a copy of it;
- 415 (3) whether, to the applicant's knowledge, there has been proposed or is in force a voluntary arrangement under Part VIII of the Insolvency Act 1986<sup>5</sup>; and
- 416 (4) the applicant's estimate of the value of the property or business in respect of which the interim receiver is to be appointed<sup>6</sup>.

If an insolvency practitioner has been appointed to inquire into the debtor's affairs, and it is proposed that he, and not the official receiver, should be appointed interim receiver, and it is not the insolvency practitioner himself who is the applicant for the order, the affidavit must state that he has consented to act<sup>7</sup>.

The applicant must send copies of the application and the affidavit to the person to be appointed interim receiver; and, if that person is the official receiver and an insolvency practitioner has been appointed to inquire into the debtor's affairs, and he is not himself the applicant, copies of the application and affidavit must be sent by the applicant to the insolvency practitioner<sup>8</sup>. If, in any case where a copy of the application is to be so sent to a person, it is for any reason not practicable to send a copy, that person must be informed of the application in sufficient time to enable him to be present at the hearing<sup>8</sup>.

The official receiver and, if appointed, the insolvency practitioner may attend the hearing of the application and make representations<sup>9</sup>.

1    Ie under the Insolvency Act 1986 s 286: see para 223 ante.

2    Ie under *ibid* s 273(2): see para 200 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.51(1).

4 As to the use of witness statements instead of affidavits in insolvency proceedings see *ibid* r 7.57(5), (6) (as substituted); and para 793 post.

5 *Ie* under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.

6 Insolvency Rules 1986, SI 1986/1925, r 6.51(2).

7 *Ibid* r 6.51(3).

8 *Ibid* r 6.51(4).

9 *Ibid* r 6.51(5).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 225. Order of appointment.

If satisfied that sufficient grounds are shown for the appointment of an interim receiver, the court may on the application make it on such terms as it thinks fit<sup>1</sup>. The court may, however, by an order appointing any person to be an interim receiver direct that his powers are to be limited or restricted in any respect; but, save as so directed, an interim receiver has, in relation to the debtor's property<sup>2</sup>, all the rights, powers, duties and immunities of a receiver and manager<sup>3</sup> pending the appointment of a trustee<sup>4</sup>.

An order of the court appointing any person to be an interim receiver must require that person to take immediate possession of the debtor's property or, as the case may be, the part of it to which his powers as interim receiver are limited<sup>5</sup>; and it must state the nature and a short description of the property of which the person appointed is to take possession and the duties to be performed by him in relation to the debtor's affairs<sup>6</sup>. Forthwith after the order is made, the court must send two sealed copies of it to the person appointed interim receiver, one of which must be sent by him forthwith to the debtor<sup>7</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.51(6).

2 For the meaning of references to the debtor's property see para 223 note 1 ante.

3 *Ie* under the Insolvency Act 1986 s 287: see paras 233-235 post.

4 *Ibid* s 286(3). As to the application of s 286 in a case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 223 note 4 ante.

5 *Ibid* s 286(4).

6 Insolvency Rules 1986, SI 1986/1925, r 6.52(1). For the prescribed form of order see rr 6.52, 12.7(1), (2), Sch 4, Form 6.32.

7 Ibid r 6.52(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **226. Deposit.**

Before an order appointing the official receiver as interim receiver is issued, the applicant for it must deposit with him, or otherwise secure to his satisfaction, such sum as the court directs to cover his remuneration and expenses<sup>1</sup>. If the sum deposited or secured subsequently proves to be insufficient, the court may, on application by the official receiver, order that an additional sum be deposited or secured; and, if the order is not complied with within two days after service on the person to whom the order is directed, the court may discharge the order appointing the interim receiver<sup>2</sup>.

If a bankruptcy order is made after an interim receiver has been appointed, any money so deposited must, unless it is required by reason of insufficiency of assets for payment of remuneration and expenses of the interim receiver, or the deposit was made by the debtor out of his own property, be repaid to the person depositing it, or as the person may direct, out of the bankrupt's estate<sup>3</sup>, in the prescribed order of priority<sup>4</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.53(1).

2 Ibid r 6.53(2). As to the order appointing an interim receiver see para 225 ante.

3 For the meaning of 'the bankrupt's estate' see para 216 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.53(3). For these purposes, 'prescribed order of priority' means the order of priority of payments laid down by Pt 6 Ch 23 (r 6.224 (as amended): see para 576 post): r 13.13(7) (substituted by SI 1999/1022).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## **227. Security; failure to keep up security.**

Where an insolvency practitioner is appointed to be interim receiver<sup>1</sup>, the cost of providing the security required<sup>2</sup> must be paid in the first instance by the interim receiver; but, if a bankruptcy order is not made, the person so appointed is entitled to be reimbursed out of the property of the debtor, and the court may make an order on the debtor accordingly; and, if a bankruptcy order is made, he is entitled to be reimbursed out of the estate<sup>3</sup> in the prescribed order of priority<sup>4</sup>.

If the interim receiver fails to give or keep up his security, the court may remove him, and make such order as it thinks fit as to costs<sup>5</sup>; and, if an order is so made removing the interim receiver, or discharging the order appointing him, the court must give directions as to whether any, and if so what, steps should be taken for the appointment of another person in his place<sup>6</sup>.

1    Ie under the Insolvency Act 1986 s 286(2): see para 223 et seq ante.

2    Ie under the Insolvency Act 1986: see s 390(3); and para 47 ante. As to the prescribed requirements for the existence of security see para 54 ante.

3    For the meaning of 'the bankrupt's estate' see para 216 ante.

4    Insolvency Rules 1986, SI 1986/1925, r 6.54(1), (2). For the meaning of 'prescribed order of priority' see para 226 note 4 ante.

5    Ibid r 6.55(1).

6    Ibid r 6.55(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(iii) Interim Receiver/228. Inquiry into debtor's dealings and property.

## **228. Inquiry into debtor's dealings and property.**

Where an interim receiver has been appointed, the debtor must give him such inventory of his property<sup>1</sup> and such other information, and must attend on the interim receiver at such times, as the latter may for the purpose of carrying out his functions reasonably require<sup>2</sup>.

The statutory provisions relating to inquiry into a bankrupt's dealings and property<sup>3</sup> and the court's enforcement powers thereunder<sup>4</sup> apply also where an interim receiver has been

appointed as they apply where a bankruptcy order has been made as if references to the official receiver or the trustee were to the interim receiver, and references to the bankrupt and to his estate were, respectively, to the debtor and his property<sup>5</sup>.

1 For the meaning of references to the debtor's property see para 223 note 1 ante.

2 Insolvency Act 1986 s 286(5). As to the application of s 286 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 223 note 4 ante.

3 *Ibid* s 366: see para 307 et seq post.

4 *Ibid* s 367: see para 314 post.

5 *Ibid* s 368. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 368 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **229. Restriction on proceedings and remedies.**

Where an interim receiver is appointed<sup>1</sup>, the statutory restriction on proceedings and remedies<sup>2</sup> applies for the period between the appointment and the making of a bankruptcy order on the petition, or the dismissal of the petition, as if the appointment were the making of such an order<sup>3</sup>.

1 *Ibid* under the Insolvency Act 1986 s 286: see para 223 et seq ante.

2 *Ibid* s 285(3): see para 218 ante.

3 *Ibid* s 286(6). As to the application of s 286 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 223 note 4 ante.

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **230. Power to ensure continuation of essential supplies by utilities.**

An interim receiver has the like rights as the supervisor of a voluntary arrangement, the official receiver, a trustee in bankruptcy and a trustee under a deed of arrangement for ensuring continued supplies of gas, electricity, water and telecommunication services<sup>1</sup>.

<sup>1</sup> See the Insolvency Act 1986 s 372 (as amended); and para 113 ante.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **231. Remuneration.**

The remuneration of the interim receiver, other than the official receiver, must be fixed by the court from time to time on his application<sup>1</sup>. In fixing the interim receiver's remuneration, the court must take into account:

- 417 (1) the time properly given by him, as interim receiver, and his staff in attending to the debtor's affairs;
- 418 (2) the complexity, or otherwise, of the case;
- 419 (3) any respects in which, in connection with the debtor's affairs, there falls on the interim receiver any responsibility of an exceptional kind or degree;
- 420 (4) the effectiveness with which the interim receiver appears to be carrying out, or to have carried out, his duties as such; and
- 421 (5) the value and nature of the property with which he has to deal<sup>2</sup>.

Without prejudice to any order the court may make as to costs, the interim receiver's remuneration, whether the official receiver or another, must be paid to him, and the amount of any expenses incurred by him, including the remuneration and expenses of any special manager<sup>3</sup>, reimbursed:

- 422 (a) if a bankruptcy order is not made, out of the property of the debtor; and



423 (b) if a bankruptcy order is made, out of the estate<sup>4</sup> in the prescribed order of priority<sup>5</sup>;

or, in either case, the relevant funds being insufficient, out of the deposit paid<sup>6</sup> by the applicant for the order appointing the interim receiver<sup>7</sup>.

Unless the court otherwise directs, in a case falling within head (a) above, the interim receiver may retain out of the debtor's property such sums or property as are or may be required for meeting his remuneration and expenses<sup>8</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.56(1). As to the official receiver's remuneration as interim receiver see para 40 ante.

2 Ibid r 6.56(2).

3 Ie any special manager appointed under the Insolvency Act 1986 s 370: see para 236 et seq post.

4 For the meaning of 'the bankrupt's estate' see para 216 ante.

5 For the meaning of 'prescribed order of priority' see para 226 note 4 ante.

6 Ie under the Insolvency Rules 1986, SI 1986/1925, r 6.53: see para 226 ante.

7 Ibid r 6.56(3) (amended by SI 1987/1919).

8 Insolvency Rules 1986, SI 1986/1925, r 6.56(4) (added by SI 1987/1919).

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **232. Termination of appointment.**

A person ceases to be interim receiver of a debtor's property<sup>1</sup> if the bankruptcy petition relating to the debtor is dismissed, if a bankruptcy order is made on the petition or if the court by order or otherwise terminates the appointment<sup>2</sup>.

The appointment of the interim receiver may be so terminated by the court on his application, or on that of the official receiver, the debtor or any creditor<sup>3</sup>.

If the interim receiver's appointment terminates, in consequence of the dismissal of the bankruptcy petition or otherwise, the court may give such directions as it thinks fit with respect to the accounts of his administration and any other matters which it thinks appropriate<sup>4</sup>.

1 For the meaning of references to the debtor's property see para 223 note 1 ante.

2 Insolvency Act 1986 s 286(7). As to the application of s 286 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 223 note 4 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.57(1).

4 Ibid r 6.57(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(iv) Receivership pending Appointment of Trustee/233. Receivership pending appointment of trustee.

## **(iv) Receivership pending Appointment of Trustee**

### **233. Receivership pending appointment of trustee.**

Between the making of a bankruptcy order<sup>1</sup> and the time at which the bankrupt's estate vests in the trustee<sup>2</sup>, the official receiver is the receiver and the manager<sup>3</sup> of the bankrupt's estate<sup>4</sup> and is under a duty to act as such<sup>5</sup>.

1 As to bankruptcy orders see para 195 et seq ante.

2 Ie under the Insolvency Act 1986 Pt IX Ch IV (ss 305-335) (as amended): see para 390 et seq post.

3 Ie subject to ibid s 370: see para 236 et seq post.

4 For the meaning of 'the bankrupt's estate' see para 216 ante.

5 Insolvency Act 1986 s 287(1). Section 287 does not apply where, by virtue of s 297 (see paras 322, 323 post), the bankrupt's estate vests in a trustee immediately on the making of the bankruptcy order: s 287(5).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 287 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 14. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

In the case of the bankruptcy of an individual member of an insolvent partnership (see para 817 et seq post), the Insolvency Act 1986 s 287 is in certain circumstances to be omitted: see the Insolvent Partnerships Order 1994, SI 1994/2421, arts 8(6), (7)(a), 10(4), (5)(a), 11(1), (2)(a); paras 820-822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1260, 1266.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(iv) Receivership pending Appointment of Trustee/234. Role of official receiver; duties and powers.

### **234. Role of official receiver; duties and powers.**

The function of the official receiver while acting as receiver or manager of the bankrupt's estate<sup>1</sup> is to protect the estate; and, for this purpose, he has the same powers as if he were a receiver or manager appointed by the High Court<sup>2</sup>, and he is entitled to sell or otherwise dispose of any perishable goods comprised in the estate and any other goods so comprised the value of which is likely to diminish if they are not disposed of<sup>3</sup>.

While so acting as receiver or manager of the estate, the official receiver:

- 424 (1) must take all such steps as he thinks fit for protecting any property which may be claimed for the estate by the trustee of that estate;
- 425 (2) is not, except in pursuance of directions given by the Secretary of State, required to do anything that involves his incurring expenditure;
- 426 (3) may, if he thinks fit, and must, if so directed by the court, at any time summon a general meeting of the bankrupt's creditors<sup>4</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 See RECEIVERS vol 39(2) (Reissue) para 301 et seq.

3 Insolvency Act 1986 s 287(2). Section 287 does not apply where, by virtue of s 297 (see paras 322, 323 post), the bankrupt's estate vests in a trustee immediately on the making of the bankruptcy order: s 287(5).

As to the application of s 287 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 233 note 5 ante.

In the case of the bankruptcy of an individual member of an insolvent partnership (see para 817 et seq post), s 287 is to be omitted: see the Insolvent Partnerships Order 1994, SI 1994/2421, arts 8(6), (7)(a), 10(4), (5)(a), 11(1), (2)(a); paras 820-822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1260, 1266.

4 Insolvency Act 1986 s 287(3). Under the Bankruptcy Act 1914 s 74(2) (repealed) the official receiver had, as far as practicable, to consult the wishes of the creditors with respect to the management of the debtor's property. Such consultation is now discretionary only.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(iv) Receivership pending Appointment of Trustee/235. Liabilities of official receiver.

### **235. Liabilities of official receiver.**

Where:

- 427 (1) the official receiver acting as receiver or manager of the bankrupt's estate<sup>1</sup> seizes or disposes of any property which is not comprised in the estate; and
- 428 (2) at the time of the seizure or disposal the official receiver believes, and has reasonable grounds for believing, that he is entitled, whether in pursuance of an order of the court or otherwise, to seize or dispose of that property,

the official receiver is not to be liable to any person in respect of any loss or damage resulting from the seizure or disposal, except in so far as that loss or damage is caused by his negligence; and he has a lien on the property, or the proceeds of its sale, for such of the expenses of the bankruptcy as were incurred in connection with the seizure or disposal<sup>2</sup>.

<sup>1</sup> For the meaning of 'the bankrupt's estate' see para 216 ante.

<sup>2</sup> Insolvency Act 1986 s 287(4). Section 287 does not apply where, by virtue of s 297 (see paras 322, 323 post), the bankrupt's estate vests in a trustee immediately on the making of the bankruptcy order: s 287(5). As to the Official Receiver's immunity see *Mond v Hyde* [1999] QB 1097, [1998] 3 All ER 833, CA.

As to the application of the Insolvency Act 1986 s 287 in the case of the administration of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 233 note 5 ante.

In the case of the bankruptcy of an individual member of an insolvent partnership (see para 817 et seq post), s 287 is to be omitted: see the Insolvent Partnerships Order 1994, SI 1994/2421, arts 8(6), (7)(a), 10(4), (5)(a), 11(1)(2)(a); paras 820-822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1260, 1266.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(v) Special Manager/236. Power to appoint special manager.

## **(v) Special Manager**

### **236. Power to appoint special manager.**

On an application by the official receiver or the trustee of the bankrupt's estate<sup>1</sup> in any case where it appears to the official receiver or trustee that the nature of the estate, property or

business, or the interests of the creditors generally, require the appointment of another person to manage the estate, property or business, the court may appoint any person to be the special manager:

- 429 (1) of a bankrupt's estate;
- 430 (2) of the business of an undischarged bankrupt; or
- 431 (3) of the property or business of a debtor in whose case the official receiver has been appointed interim receiver<sup>2</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 Insolvency Act 1986 s 370(1), (2). As to the appointment of the official receiver as interim receiver see s 286; and para 223 et seq ante.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 370 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(v) Special Manager/237. Application for appointment.

### **237. Application for appointment.**

An application<sup>1</sup> made by the official receiver or trustee for the appointment of a person to be special manager must be supported by a report setting out the reasons for the application; and the report must include the applicant's estimate of the value of the estate, property or business in respect of which the special manager is to be appointed<sup>2</sup>.

1 ie under the Insolvency Act 1986 s 370: see para 236 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.167(1).

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **238. Appointment and remuneration.**

The court's order appointing the special manager must specify the duration of his appointment, which may be for a period of time, or until the occurrence of a specified event; alternatively, the order may specify that the duration of the appointment is to be subject to a further order of the court<sup>1</sup>.

The appointment of a special manager may be renewed by order of the court<sup>2</sup>; and the special manager's remuneration must be fixed from time to time by the court<sup>3</sup>.

1    Insolvency Rules 1986, SI 1986/1925, r 6.167(2). For the prescribed form of order see rr 6.167, 12.7(1), (2), Sch 4, Form 6.54.

2    Ibid r 6.167(3).

3    Ibid r 6.167(4).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(v) Special Manager/239. Powers of special manager.

### **239. Powers of special manager.**

A special manager appointed by the court<sup>1</sup> has such powers as may be entrusted to him by the court<sup>2</sup>; and this includes power to direct that any statutory provision<sup>3</sup> that has effect in relation to the official receiver, interim receiver or trustee is to have the like effect in relation to the special manager for the purposes of the carrying out by him of any of the functions of the official receiver, interim receiver or trustee<sup>4</sup>. A special manager may take part in the public examination of the bankrupt<sup>5</sup>.

The acts of a person as a special manager are valid notwithstanding any defect in his appointment or qualifications<sup>6</sup>.

1    Ie under the Insolvency Act 1986 s 370: see para 236 ante.

2    Ibid s 370(3). As to the application of s 370 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 236 note 2 ante.

3 le any provisions in ibid Pts VIII-XI (ss 252-385) (as amended).

4 Ibid s 370(4).

5 See ibid s 290(4)(c); and para 295 head (3) post.

6 Ibid s 377. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 377 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(v) Special Manager/240. Security; failure to keep up security.

#### 240. Security; failure to keep up security.

A special manager must give such security as may be prescribed<sup>1</sup>; and the appointment of the special manager<sup>2</sup> does not take effect until the person appointed has given, or, being allowed by the court to do so, undertaken to give, security to the person who applies for him to be appointed<sup>3</sup>. It is not, however, necessary that security should be given for each separate bankruptcy; but it may be given either specially for a particular bankruptcy, or generally for any bankruptcy in relation to which the special manager may be employed as such<sup>4</sup>.

The amount of the security must be not less than the value of the estate, property or business in respect of which he is appointed, as estimated by the applicant in his report<sup>5</sup>.

When the special manager has given security to the person applying for his appointment, that person's certificate as to the adequacy of the security must be filed in court<sup>6</sup>. The cost of providing the security must be paid for in the first instance by the special manager but:

432 (1) where a bankruptcy order<sup>7</sup> is not made, he is entitled to be reimbursed out of the property of the debtor, and the court may make an order on the debtor accordingly; and

433 (2) where a bankruptcy order is made, he is entitled to be reimbursed out of the estate in the prescribed order of priority<sup>8</sup>.

If the special manager fails to give the required security within the time stated for that purpose by the order appointing him, or any extension of that time that may be allowed, the official receiver or trustee, as the case may be, must report the failure to the court, which may thereupon discharge the order appointing the special manager<sup>9</sup>.

If the special manager fails to keep up his security, the official receiver or trustee must report his failure to the court, which may thereupon remove the special manager, and make such order as it thinks fit as to costs<sup>10</sup>.

If an order is so made removing the special manager, or discharging the order appointing him, the court must give directions as to whether any, and if so what, steps should be taken for the appointment of another special manager in his place<sup>11</sup>.

1 Insolvency Act 1986 s 370(5)(a). As to the application of s 370 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 236 note 2 ante.

2 *Ibid* under *ibid* s 370: see para 236 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.168(1).

4 *Ibid* r 6.168(2).

5 *Ibid* r 6.168(3). The applicant's report is made under r 6.167(1) (see para 237 ante): r 6.168(3).

6 *Ibid* r 6.168(4). For the meaning of 'file in court' see para 95 note 10 ante.

7 As to bankruptcy orders see para 195 et seq ante.

8 Insolvency Rules 1986, SI 1986/1925, r 6.168(5). For the meaning of 'prescribed order of priority' see para 226 note 4 ante.

9 *Ibid* r 6.169(1).

10 *Ibid* r 6.169(2).

11 *Ibid* r 6.169(3).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(v) Special Manager/241. Accounting.

### 241. Accounting.

The special manager must prepare and keep such accounts as may be prescribed<sup>1</sup>; and he must produce accounts, containing details of his receipts and payments, for the approval of the trustee<sup>2</sup>. The accounts must be in respect of three-month periods for the duration of the special manager's appointment, or for a lesser period, if his appointment terminates less than three months from its date, or from the date to which the last accounts were made up<sup>3</sup>. When the accounts have been approved, the special manager's receipts and payments must be added to those of the trustee<sup>4</sup>.

1 Insolvency Act 1986 s 370(5)(b). A special manager must produce those accounts in accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended) to the Secretary of State or to such other persons as may be prescribed: Insolvency Act 1986 s 370(5)(c). The Insolvency Rules 1986, SI 1986/1925, r 6.170(1) requires production of the accounts to the trustee only: see *infra*. As to the application of the Insolvency Act 1986 s 370



in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 236 note 2 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.170(1).

3 Ibid r 6.170(2).

4 Ibid r 6.170(3).

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

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#### **242. Termination of appointment.**

The special manager's appointment terminates if the bankruptcy petition is dismissed or if, an interim receiver having been appointed<sup>1</sup>, the latter is discharged without a bankruptcy order having been made<sup>2</sup>.

If the official receiver or the trustee is of opinion that the employment of the special manager is no longer necessary or profitable for the estate, he must apply to the court for directions, and the court may order the special manager's appointment to be terminated<sup>3</sup>.

The official receiver or the trustee must make the same application if a resolution of the creditors is passed, requesting that the appointment be terminated<sup>4</sup>.

1 le under the Insolvency Act 1986 s 286: see para 223 et seq ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.171(1). As to bankruptcy orders see para 195 et seq ante.

3 Ibid r 6.171(2).

4 Ibid r 6.171(3).

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF

BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/A. BANKRUPT'S DUTIES IN RELATION TO OFFICIAL RECEIVER/243. Duties of bankrupt in relation to official receiver.

## **(vi) Investigation of Bankrupt's Affairs**

### **A. BANKRUPT'S DUTIES IN RELATION TO OFFICIAL RECEIVER**

#### **243. Duties of bankrupt in relation to official receiver.**

Where a bankruptcy order has been made<sup>1</sup>, the bankrupt is under a duty:

- 434 (1) to deliver possession of his estate<sup>2</sup> to the official receiver; and
- 435 (2) to deliver up to the official receiver all books, papers and other records of which he has possession or control and which relate to his estate and affairs<sup>3</sup>, including any which would be privileged from disclosure in any proceedings<sup>4</sup>.

In the case of any part of the bankrupt's estate which consists of things possession of which cannot be delivered to the official receiver, and in the case of any property that may be claimed for the bankrupt's estate by the trustee, it is the bankrupt's duty to do all such things as may be required by the official receiver for the protection of those things or that property<sup>5</sup>.

The bankrupt must give the official receiver such inventory of his estate and such other information, and must attend on the official receiver at such times, as the official receiver may<sup>6</sup> reasonably require<sup>7</sup>.

If the bankrupt fails without reasonable excuse to comply with any of the above obligations, he is guilty of contempt of court and is liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>8</sup>.

1 As to bankruptcy orders see para 195 et seq ante.

2 For the meaning of 'the bankrupt's estate' see para 216 ante.

3 For the meaning of references to a person's affairs see para 81 note 4 ante.

4 Insolvency Act 1986 s 291(1). Section 291(1) and s 291(2) (see infra) do not apply where, by virtue of s 297 (see paras 322, 323 post), the bankrupt's estate vests in a trustee immediately on the making of the bankruptcy order: s 291(3). For a discussion of the law relating to privilege in bankruptcy see *Re Konigsberg (a bankrupt), ex p Trustee v Konigsberg* [1989] 3 All ER 289, sub nom *Re Konigsberg (a bankrupt), ex p Trustee of Property of Bankrupt v Konigsberg* [1989] 1 WLR 1257 (solicitor instructed jointly by bankrupt and wife).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 291 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 17. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 Insolvency Act 1986 s 291(2). See also note 4 supra.

6 Ie for any of the purposes of ibid Pt IX Ch II (ss 283-291) (as amended).

7 Ibid s 291(4). Section 291(4) applies to a bankrupt after his discharge: s 291(5). See also *A-G's Reference (No 7 of 2000)* [2001] EWCA Crim 888, [2001] 1 WLR 1879 (privilege against self-incrimination is not absolute and is overridden by the bankrupt's duty under the Insolvency Act 1986 s 291 to deliver up documents). As to discharge from bankruptcy see para 629 et seq post.

8 Insolvency Act 1986 s 291(6). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq; and as to offences see para 707 et seq post. For the prescribed form of affidavit in support of an application for committal for contempt of court see the Insolvency Rules 1986, SI 1986/1925, rr 12.7(1), (2), Sch

4, Form 7.15 (substituted by SI 1991/495); and for the prescribed form of warrant of committal for contempt see the Insolvency Rules 1986, SI 1986/1925, Sch 4, Form 7.17.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **243 Duties of bankrupt in relation to official receiver**

TEXT AND NOTES 6, 7--The information which the official receiver may reasonably require must be for a purpose of the 1986 Act Pt IX Ch II (ss 283-291), or in connection with the making of a bankruptcy restrictions order: s 291(4) (substituted by the Enterprise Act 2002 Sch 23 para 5). As to bankruptcy restrictions orders see PARA 646A.1.

NOTE 8--SI 1986/1925 Sch 4 Forms 7.15, 7.17 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/B. BANKRUPT'S STATEMENT OF AFFAIRS; CREDITOR'S PETITION/244. Statement of affairs.

## ***B. BANKRUPT'S STATEMENT OF AFFAIRS; CREDITOR'S PETITION***

### **244. Statement of affairs.**

Where a bankruptcy order has been made otherwise than on a debtor's petition<sup>1</sup>, the bankrupt must submit a statement of his affairs to the official receiver before the end of the period of 21 days beginning with the commencement of the bankruptcy<sup>2</sup>.

A bankrupt who:

- 436 (1) without reasonable excuse fails to comply with the above obligation; or
- 437 (2) without reasonable excuse submits a statement of affairs that does not comply with the prescribed requirements,

is guilty of a contempt of court and liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>3</sup>.

<sup>1</sup> As to the statement of affairs on a debtor's petition see para 252 et seq post.

<sup>2</sup> Insolvency Act 1986 s 288(1). If he thinks fit, the official receiver may release a bankrupt from his duty under s 288(1) or extend the period specified in s 288(1): s 288(3). See further para 248 post. As to the commencement of bankruptcy see para 213 ante.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 288 applies; but, where an insolvency administration order has been made, the personal representative, or if there is no personal representative, such person as the court may on the application of the official receiver direct, must submit to the official receiver a statement of the deceased debtor's affairs containing particulars of the assets and liabilities of the estate as at the date of the insolvency administration order together with other particulars of the affairs of the deceased debtor in the prescribed form

or as the official receiver may require; and the statement must be submitted before the end of the period of 56 days beginning with the date of a request by the official receiver for the statement or such longer period as he or the court may allow: s 288(1), (2) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 15). For the prescribed form of statement of affairs see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 7.

In the case of the death of the debtor after the presentation of a bankruptcy petition, where a bankruptcy order has been made otherwise than on a debtor's petition and the debtor has subsequently died without submitting a statement of his affairs to the official receiver, the personal representative or such other person as the court, on the application of the official receiver, may direct must submit to the official receiver a statement of the deceased debtor's affairs containing particulars of the assets and liabilities of the estate as at the date of the order together with other particulars of the affairs of the deceased debtor in the prescribed form or as the official receiver may require; and the Insolvency Rules 1986, SI 1986/1925 (as amended) apply to such a statement as they apply to an ordinary statement of affairs of a debtor: Insolvency Act 1986 s 288(1) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 5, Sch 2 para 1). Such statement must be submitted before the end of the period of 56 days beginning with the date of a request by the official receiver for the statement or such longer period as he or the court may allow: Insolvency Act 1986 s 288(2) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 2 para 1). As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

As to the modification of the Insolvency Act 1986 s 288 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 820 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1229.

3 Insolvency Act 1986 s 288(4). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq; and as to offences see para 707 et seq post. For the prescribed form of affidavit in support of an application for committal for contempt of court see the Insolvency Rules 1986, SI 1986/1925, rr 12.7(1), (2), Sch 4, Form 7.15 (substituted by SI 1991/495); and for the prescribed form of warrant of committal for contempt see the Insolvency Rules 1986, SI 1986/1925, Sch 4, Form 7.17.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### 244 Statement of affairs

NOTE 3--SI 1986/1925 Sch 4 Forms 7.15, 7.17 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/B. BANKRUPT'S STATEMENT OF AFFAIRS; CREDITOR'S PETITION/245. Form of statement of affairs.

#### 245. Form of statement of affairs.

The statement of affairs must contain such particulars of the bankrupt's creditors and of his debts and other liabilities and of his assets as may be prescribed, and such other information as may be prescribed<sup>1</sup>; and it must be in the prescribed form and contain all the particulars required by that form<sup>2</sup>.

<sup>1</sup> Insolvency Act 1986 s 288(2). The Insolvency Rules 1986, SI 1986/1925, rr 6.58-6.66 (see *infra*; and para 246 et seq post) apply with respect to the statement of affairs required by the Insolvency Act 1986 s 288(1) (see para 244 ante) to be submitted by the bankrupt, following a bankruptcy order made on a creditor's

petition, and the further and other disclosure which is required of him in that case: Insolvency Rules 1986, SI 1986/1925, r 6.58.

As to the application of the Insolvency Act 1986 s 288 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 244 note 2 ante; and as to the modification of s 288(1), (2) in the case of the death of a debtor after the presentation of a bankruptcy petition see para 244 note 2 ante.

As to the modification of s 288 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 820 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1229.

2 Insolvency Rules 1986, SI 1986/1925, r 6.59. For the prescribed form of statement of affairs see rr 6.59, 12.7(1), (2), Sch 4, Form 6.33.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/B. BANKRUPT'S STATEMENT OF AFFAIRS; CREDITOR'S PETITION/246. Verification and filing.

#### **246. Verification and filing.**

The bankrupt must be furnished by the official receiver with instructions for the preparation of his statement of affairs, and the forms required for that purpose<sup>1</sup>.

The statement of affairs must be verified by affidavit<sup>2</sup> and delivered to the official receiver, together with one copy<sup>3</sup>; and the official receiver must file the verified statement in court<sup>4</sup>. The affidavit may be sworn before an official receiver or a deputy official receiver, or before an officer of the Department of Trade and Industry or the court duly authorised in that behalf<sup>5</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.60(1). As to the prescribed form of the statement of affairs see para 245 note 2 ante.

2 A witness statement may not be used: see *ibid* r 7.57(6) (as substituted); and para 793 post.

3 *Ibid* r 6.60(2).

4 *Ibid* r 6.60(3). For the meaning of 'file in court' see para 95 note 10 ante.

5 *Ibid* rr 6.60(4), 13.13(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## 246 Verification and filing

TEXT AND NOTE 5--For 'Department of Trade and Industry' read 'Department for Business, Innovation and Skills': SI 1986/1925 r 13.13(2) (amended by SI 2009/2748).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/B. BANKRUPT'S STATEMENT OF AFFAIRS; CREDITOR'S PETITION/247. Limited disclosure.

### 247. Limited disclosure.

Where the official receiver thinks that it would prejudice the conduct of the bankruptcy for the whole or part of the statement of affairs to be disclosed, he may apply to the court for an order of limited disclosure in respect of the statement, or any specified part of it<sup>1</sup>. The court may, on the application, order that the statement or, as the case may be, the specified part of it be not filed in court<sup>2</sup>, or that it is to be filed separately and not be open to inspection otherwise than with the permission of the court<sup>3</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.61(1).

2 For the meaning of 'file in court' see para 95 note 10 ante.

3 Insolventcy Rules 1986, SI 1986/1925, r 6.61(2). See also r 7.31(5); and para 779 post.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/B. BANKRUPT'S STATEMENT OF AFFAIRS; CREDITOR'S PETITION/248. Release from duty to submit statement of affairs; extension of time.

### 248. Release from duty to submit statement of affairs; extension of time.

If he thinks fit, the official receiver may release the bankrupt from his duty to submit a statement of affairs<sup>1</sup>, or extend the statutory period<sup>2</sup> for doing so; and, where the official receiver has refused to exercise his statutory power, the court may, if it thinks fit, exercise it<sup>3</sup>.

The power of the official receiver so to release the bankrupt from his duty to submit a statement of affairs, or to grant an extension of time, may be exercised at the official receiver's own discretion, or at the bankrupt's request<sup>4</sup>. If the bankrupt requests a release or extension of

time and it is refused by the official receiver, he may apply to the court for it<sup>5</sup>. If the court thinks that no sufficient cause is shown for the application, it may dismiss it; but it may not do so unless the bankrupt has had an opportunity to attend for a hearing without notice being served on any other party, of which he has been given at least seven days' notice; and, if the application is not so dismissed, the court must fix a venue<sup>6</sup> for it to be heard, and give notice to the bankrupt accordingly<sup>7</sup>.

At least 14 days before the hearing, the bankrupt must send to the official receiver a notice stating the venue and accompanied by a copy of the application, and of any evidence which he, the bankrupt, intends to adduce in support of it<sup>8</sup>.

The official receiver may appear and be heard on the application; and, whether or not he appears, he may file a written report of any matters which he considers ought to be drawn to the court's attention; and, if such a report is filed, it must be sent by the official receiver to the bankrupt, not later than five days before the hearing<sup>9</sup>.

Sealed copies of the order made on the application must be sent by the court to the bankrupt and the official receiver<sup>10</sup>. On any such application the bankrupt's costs must be paid in any event by him and, unless the court otherwise orders, no allowance towards them may be made out of the estate<sup>11</sup>.

1    Ie under the Insolvency Act 1986 s 288(1): see para 244 ante.

2    Ie the period specified in *ibid* s 288(1): see para 244 ante.

3    *Ibid* s 288(3). As to the application of s 288 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 244 note 2 ante.

4    Insolvency Rules 1986, SI 1986/1925, r 6.62(1).

5    *Ibid* r 6.62(2).

6    For the meaning of 'venue' see para 84 note 21 ante.

7    Insolvency Rules 1986, SI 1986/1925, r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 6.62(3).

8    *Ibid* r 6.62(4).

9    *Ibid* r 6.62(5).

10   *Ibid* r 6.62(6).

11   *Ibid* r 6.62(7).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in **PARA 2 NOTE 5**.

### **248 Release from duty to submit statement of affairs; extension of time**

**NOTE 7**--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/B. BANKRUPT'S STATEMENT OF AFFAIRS; CREDITOR'S PETITION/249. Expenses of statement of affairs; assistance in preparation.

#### **249. Expenses of statement of affairs; assistance in preparation.**

If the bankrupt cannot himself prepare a proper statement of affairs, the official receiver may, at the expense of the estate, employ some person or persons to assist in the preparation of the statement<sup>1</sup>.

At the request of the bankrupt, made on the grounds that he cannot himself prepare a proper statement, the official receiver may authorise an allowance payable out of the estate, in accordance with the prescribed order of priority<sup>2</sup>, towards expenses to be incurred by the bankrupt in employing some person or persons to assist him in preparing it<sup>3</sup>.

Any such request by the bankrupt must be accompanied by an estimate of the expenses involved; and the official receiver may only authorise the employment of a named person or a named firm, being in either case approved by him<sup>4</sup>.

An authorisation so given by the official receiver must be subject to such conditions, if any, as he thinks fit to impose with respect to the manner in which any person may obtain access to relevant books and papers<sup>5</sup>.

Nothing in the above provisions, however, relieves the bankrupt from any obligation with respect to the preparation, verification and submission of his statement of affairs, or to the provision of information to the official receiver or the trustee<sup>6</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.63(1).

2 For the meaning of 'prescribed order of priority' see para 226 note 4 ante.

3 Insolventcy Rules 1986, SI 1986/1925, r 6.63(2).

4 Ibid r 6.63(3).

5 Ibid r 6.63(4).

6 Ibid r 6.63(5).

#### **UPDATE**

#### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/B. BANKRUPT'S STATEMENT OF AFFAIRS; CREDITOR'S PETITION/250. Submission and filing of accounts.



## **250. Submission and filing of accounts.**

At the request of the official receiver, the bankrupt must furnish him with accounts relating to his affairs of such nature, as at such date and for such period as he, the official receiver, may specify<sup>1</sup>. The period specified may begin from a date up to three years preceding the date of the presentation of the bankruptcy petition<sup>2</sup>; and, on the official receiver's application, the court may require accounts in respect of any earlier period<sup>3</sup>.

The accounts to be so furnished must, if the official receiver so requires, be verified by affidavit<sup>4</sup>, and, whether or not so verified, delivered to him within 21 days of the request, or such longer period as he may allow<sup>5</sup>. Two copies of the accounts and, where required, the affidavit must be delivered by the bankrupt to the official receiver, who must file one copy in court<sup>6</sup>, with the affidavit, if any<sup>7</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.64(1). Rule 6.63 (see para 249 ante) applies, with the necessary modifications, in relation to accounts to be furnished under r 6.64 as it applies in relation to the statement of affairs: r 6.64(4).

2 Ibid r 6.64(2). As to the presentation of the bankruptcy petition see para 192 ante.

3 Ibid r 6.64(3).

4 A witness statement may not be used: see ibid r 7.57(6) (as substituted); and para 793 post.

5 Ibid r 6.65(1).

6 For the meaning of 'file in court' see para 95 note 10 ante.

7 Insolvency Rules 1986, SI 1986/1925, r 6.65(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/B. BANKRUPT'S STATEMENT OF AFFAIRS; CREDITOR'S PETITION/251. Further disclosure.

## **251. Further disclosure.**

The official receiver may at any time require the bankrupt to submit, in writing, further information amplifying, modifying or explaining any matter contained in his statement of affairs<sup>1</sup>, or in accounts submitted<sup>2</sup> by him<sup>3</sup>. The information must, if the official receiver so directs, be verified by affidavit<sup>4</sup>, and, whether or not so verified, delivered to him within 21 days of the requirement, or such longer period as he may allow<sup>5</sup>.

Two copies of the documents containing the information and, where verification is directed, the affidavit must be delivered by the bankrupt to the official receiver, who must file one copy in court<sup>6</sup>, with the affidavit, if any<sup>7</sup>.

- 1 As to the statement of affairs see para 244 et seq ante.
- 2 le in pursuance of the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended). As to the submission and filing of accounts see para 250 ante.
- 3 Ibid r 6.66(1).
- 4 A witness statement may not be used: see ibid r 7.57(6) (as substituted); and para 793 post.
- 5 Ibid r 6.66(2).
- 6 For the meaning of 'file in court' see para 95 note 10 ante.
- 7 Insolvency Rules 1986, SI 1986/1925, r 6.66(3).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/C. BANKRUPT'S STATEMENT OF AFFAIRS; DEBTOR'S PETITION/252. Statement of affairs; contents.

## ***C. BANKRUPT'S STATEMENT OF AFFAIRS; DEBTOR'S PETITION***

### **252. Statement of affairs; contents.**

The debtor's petition for his own bankruptcy must be accompanied by a statement of affairs, verified by affidavit<sup>1</sup>; and the statement of affairs required so to accompany the debtor's petition must be in the prescribed form, and must contain all the particulars required by that form<sup>2</sup>.

1 See the Insolvency Rules 1986, SI 1986/1925, r 6.41(1); and para 159 ante. A witness statement may not be used: see r 7.57(6) (as substituted); and para 793 post.

2 Ibid r 6.68. For the prescribed form of statement of affairs see rr 6.41, 6.68, 12.7(1), (2), Sch 4, Form 6.28. Rules 6.67-6.72 (see supra; and para 253 et seq post) apply with respect to the statement of affairs required in the case of a person petitioning for a bankruptcy order to be made against him, and further disclosure which is required of him in that case: r 6.67.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## 252 Statement of affairs; contents

NOTE 2--SI 1986/1925 Sch 4 Form 6.28 substituted: SI 2005/2114.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/C. BANKRUPT'S STATEMENT OF AFFAIRS; DEBTOR'S PETITION/253. Submission and filing of accounts.

### 253. Submission and filing of accounts.

At the request of the official receiver, the bankrupt must furnish him with accounts relating to his, the debtor's, affairs of such nature, as at such date and for such period as he may specify<sup>1</sup>. The period may begin from a date up to three years preceding the date of the presentation of the bankruptcy petition<sup>2</sup>. On the official receiver's application, the court may require accounts in respect of any earlier period<sup>3</sup>.

The accounts to be so furnished must, if the official receiver so requires, be verified by affidavit<sup>4</sup>, and, whether or not so verified, delivered to him within 21 days of the request, or such longer period as he may allow<sup>5</sup>.

Two copies of the accounts and, where required, the affidavit must be delivered by the bankrupt to the official receiver, who must file one copy in court<sup>6</sup>, with the affidavit, if any<sup>7</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.69(1).

2 Ibid r 6.69(2). As to the presentation of the bankruptcy petition see para 192 ante.

3 Ibid r 6.69(3).

4 A witness statement may not be used: see ibid r 7.57(6) (as substituted); and para 793 post.

5 Ibid r 6.70(1).

6 For the meaning of 'file in court' see para 95 note 10 ante.

7 Insolventcy Rules 1986, SI 1986/1925, r 6.70(2).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/C.

BANKRUPT'S STATEMENT OF AFFAIRS; DEBTOR'S PETITION/254. Expenses of preparing accounts; assistance in preparation.

#### **254. Expenses of preparing accounts; assistance in preparation.**

If the bankrupt cannot himself prepare proper accounts<sup>1</sup>, the official receiver may, at the expense of the estate, employ some person or persons to assist in their preparation<sup>2</sup>.

At the request of the bankrupt, made on the grounds that he cannot himself prepare the accounts, the official receiver may authorise an allowance payable out of the estate, in accordance with the prescribed order of priority<sup>3</sup>, towards expenses to be incurred by the bankrupt in employing some person or persons to assist him in their preparation<sup>4</sup>.

Any such request by the bankrupt must be accompanied by an estimate of the expenses involved; and the official receiver may only authorise the employment of a named person or a named firm, being in either case approved by him<sup>5</sup>.

An authorisation so given by the official receiver must be subject to such conditions, if any, as he thinks fit to impose with respect to the manner in which any person may obtain access to relevant books and papers<sup>6</sup>.

Nothing in the above provisions, however, relieves the bankrupt from any obligation with respect to the preparation, verification and submission of accounts, or to the provision of information to the official receiver or the trustee<sup>7</sup>.

1    Ie under the Insolvency Rules 1986, SI 1986/1925, r 6.69: see para 253 ante.

2    Ibid r 6.71(1).

3    For the meaning of 'prescribed order of priority' see para 226 note 4 ante.

4    Insolvency Rules 1986, SI 1986/1925, r 6.71(2).

5    Ibid r 6.71(3).

6    Ibid r 6.71(4).

7    Ibid r 6.71(5).

#### **UPDATE**

#### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vi) Investigation of Bankrupt's Affairs/C. BANKRUPT'S STATEMENT OF AFFAIRS; DEBTOR'S PETITION/255. Further disclosure.

#### **255. Further disclosure.**

The official receiver may at any time require the bankrupt to submit, in writing, further information amplifying, modifying or explaining any matter contained in his statement of affairs<sup>1</sup>, or in accounts submitted<sup>2</sup> by him<sup>3</sup>. If the official receiver so directs, the information must be verified by affidavit<sup>4</sup>, and, whether or not so verified, delivered to him within 21 days from the date of the requirement, or such longer period as he may allow<sup>5</sup>.

Two copies of the document containing the information and, where verification is directed, the affidavit must be delivered by the bankrupt to the official receiver, who must file one copy in court<sup>6</sup>, with the affidavit, if any<sup>7</sup>.

1 As to the statement of affairs see para 252 ante.

2 In pursuance of the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended). As to the submission and filing of accounts see para 253 ante.

3 Ibid r 6.72(1).

4 A witness statement may not be used: see ibid r 7.57(6) (as substituted); and para 793 post.

5 Ibid r 6.72(2).

6 For the meaning of 'file in court' see para 95 note 10 ante.

7 Insolvency Rules 1986, SI 1986/1925, r 6.72(3).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vii) Investigatory Duties of the Official Receiver/A. IN GENERAL/256. Duty to investigate.

## **(vii) Investigatory Duties of the Official Receiver**

### **A. IN GENERAL**

#### **256. Duty to investigate.**

It is the duty of the official receiver to investigate the conduct and affairs of every bankrupt and to make such report, if any, to the court as he thinks fit<sup>1</sup>. Where, however, a certificate for the summary administration of the bankrupt's estate is for the time being in force<sup>2</sup>, the official receiver must carry out such an investigation only if he thinks fit<sup>3</sup>.

1 Insolvency Act 1986 s 289(1). In s 289(1) the reference to the conduct and affairs of a bankrupt includes his conduct and affairs before the making of the order by which he was adjudged bankrupt: s 289(4). A report by the official receiver under s 289 is, in any proceedings, prima facie evidence of the facts stated in it: s 289(3). Where an application is made by the bankrupt under s 280 (see para 630 post) for his discharge from bankruptcy, it is the duty of the official receiver to make a report to the court with respect to the prescribed

matters; and the court must consider that report before determining what order, if any, to make under s 280: s 289(2).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the official receiver is not under any duty to investigate the conduct and affairs of the deceased debtor unless he thinks fit but may make such report, if any, to the court as he thinks fit: s 289 (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 16). As to the administration in bankruptcy of the insolvent estates of deceased persons see para 823 et seq post.

2 See para 206 et seq ante.

3 Insolvency Act 1986 s 289(5).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **256 Duty to investigate**

TEXT AND NOTE 1--Provisions equivalent to those contained in the 1986 Act s 289(1)-(4) are now in s 289(1), (3), (4) (s 289 substituted by the Enterprise Act 2002 s 258). The official receiver is not required to investigate the conduct of the affairs of a bankrupt or to make a report on any such investigation in a case in which he thinks such an investigation is unnecessary: 1986 Act s 289(2).

NOTE 3--1986 Act s 289 substituted (see TEXT AND NOTE 1); s 289(5) not re-enacted as the provisions concerning summary administration have been repealed (see PARAS 206-209).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vii) Investigatory Duties of the Official Receiver/B. INFORMATION TO CREDITORS/257. Report to creditors.

## ***B. INFORMATION TO CREDITORS***

### **257. Report to creditors.**

At least once after the making of the bankruptcy order<sup>1</sup>, the official receiver must send a report to creditors<sup>2</sup> with respect to the bankruptcy proceedings, and the state of the bankrupt's affairs<sup>3</sup>; and the official receiver must file in court<sup>4</sup> a copy of any report so sent<sup>5</sup>.

1 As to bankruptcy orders see para 195 et seq ante.

2 Any reference in the Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 7 (rr 6.73-6.78 (as amended): see *infra*; and para 258 et seq post) to creditors is to creditors of the bankrupt who are known to the official receiver or, where the bankrupt has submitted a statement of affairs (see para 244 et seq ante), are identified in the statement: r 6.74.

3 *Ibid* r 6.73(1) (renumbered by SI 1987/1919).

4 For the meaning of 'file in court' see para 95 note 10 ante.

5 Insolvency Rules 1986, SI 1986/1925, r 6.73(2) (added by SI 1987/1919).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **257-261 Information to creditors**

See SI 1986/1925 r 6.78A (supervisor's accounts and reports), r 6.78B (final report to creditors and bankrupt), r 6.78C (creditors' request for further information), r 6.78D (distribution of property in specie) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vii) Investigatory Duties of the Official Receiver/B. INFORMATION TO CREDITORS/258. Report where statement of affairs lodged.

### **258. Report where statement of affairs lodged.**

Where the bankrupt has submitted a statement of affairs<sup>1</sup>, and it has been filed in court<sup>2</sup>, the official receiver must send out to creditors<sup>3</sup> a report containing a summary of the statement (if he thinks fit, as amplified, modified or explained<sup>4</sup>), and such observations, if any, as he thinks fit to make with respect to it or to the bankrupt's affairs generally<sup>5</sup>.

The official receiver need not, however, comply with the above obligation if he has previously reported to creditors with respect to the bankrupt's affairs, so far as known to him, and he is of opinion that there are no additional matters which ought to be brought to their attention<sup>6</sup>.

1 As to the statement of affairs see para 244 et seq ante.

2 For the meaning of 'file in court' see para 95 note 10 ante.

3 For the meaning of references to creditors see para 257 note 2 ante.

4 I.e by virtue of the Insolvency Rules 1986, SI 1986/1925, r 6.66 (see para 251 ante) or r 6.72 (see para 255 ante).

5 Ibid r 6.75(1) (amended by SI 1987/1919).

6 Insolvency Rules 1986, SI 1986/1925, r 6.75(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **257-261 Information to creditors**

See SI 1986/1925 r 6.78A (supervisor's accounts and reports), r 6.78B (final report to creditors and bankrupt), r 6.78C (creditors' request for further information), r 6.78D (distribution of property in specie) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vii) Investigatory Duties of the Official Receiver/B. INFORMATION TO CREDITORS/259. Statement of affairs dispensed with.

### **259. Statement of affairs dispensed with.**

Where the bankrupt has been released from the obligation to submit a statement of affairs<sup>1</sup>, then, as soon as may be after the release has been granted, the official receiver must send to creditors<sup>2</sup> a report containing a summary of the bankrupt's affairs, so far as within his knowledge, and his observations, if any, with respect to it or the bankrupt's affairs generally<sup>3</sup>.

The official receiver need not, however, comply with the above obligation if he has previously reported to creditors with respect to the bankrupt's affairs, so far as known to him, and he is of opinion that there are no additional matters which ought to be brought to their attention<sup>4</sup>.

1 See para 248 ante.

2 For the meaning of references to creditors see para 257 note 2 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.76(1), (2).

4 Ibid r 6.76(3).

### **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **257-261 Information to creditors**

See SI 1986/1925 r 6.78A (supervisor's accounts and reports), r 6.78B (final report to creditors and bankrupt), r 6.78C (creditors' request for further information), r 6.78D (distribution of property in specie) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF



BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vii) Investigatory Duties of the Official Receiver/B. INFORMATION TO CREDITORS/260. General rule as to reporting.

## **260. General rule as to reporting.**

On the official receiver's application, the court may relieve him of any duty imposed on him to provide information to creditors<sup>1</sup>, or authorise him to carry out the duty in a way other than is so required<sup>2</sup>.

In considering whether to act as above, the court must have regard to the cost of carrying out the duty, to the amount of the funds available in the estate, and to the extent of the interest of creditors or any particular class of them<sup>3</sup>.

1     Ie under the Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 7 (rr 6.73-6.78) (as amended): see *infra*; para 257 et seq ante; and para 261 post. For the meaning of references to creditors see para 257 note 2 ante.

2     Ibid r 6.77(1).

3     Ibid r 6.77(2).

### **UPDATE**

#### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **257-261 Information to creditors**

See SI 1986/1925 r 6.78A (supervisor's accounts and reports), r 6.78B (final report to creditors and bankrupt), r 6.78C (creditors' request for further information), r 6.78D (distribution of property in specie) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(vii) Investigatory Duties of the Official Receiver/B. INFORMATION TO CREDITORS/261. Bankruptcy order annulled.

## **261. Bankruptcy order annulled.**

If the bankruptcy order is annulled<sup>1</sup>, the duty of the official receiver to send reports<sup>2</sup> ceases<sup>3</sup>.

1     See para 610 et seq post.

2     Ie under the Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 7 (rr 6.73-6.78) (as amended): see para 257 et seq ante.

3     Ibid r 6.78.

### **UPDATE**

## **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **257-261 Information to creditors**

See SI 1986/1925 r 6.78A (supervisor's accounts and reports), r 6.78B (final report to creditors and bankrupt), r 6.78C (creditors' request for further information), r 6.78D (distribution of property in specie) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/A. IN GENERAL/262. Power to ensure continuation of essential supplies by utilities.

### **(viii) Official Receiver's Powers**

#### **A. IN GENERAL**

#### **262. Power to ensure continuation of essential supplies by utilities.**

The official receiver has the like rights as the supervisor of a voluntary arrangement, an interim receiver, a trustee in bankruptcy and a trustee under a deed of arrangement for ensuring continued supplies of gas, electricity, water and telecommunication services<sup>1</sup>.

<sup>1</sup> See the Insolvency Act 1986 s 372 (as amended); and para 113 ante.

## **UPDATE**

## **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/A. IN GENERAL/263. Power to call meetings.

#### **263. Power to call meetings.**

The official receiver must summon a general meeting of the bankrupt's creditors for the purpose of appointing a trustee of the bankrupt's estate<sup>1</sup>; and he may at any time summon and

conduct meetings of creditors for the purpose of ascertaining their wishes in all matters relating to the bankruptcy<sup>2</sup>.

1 See para 265 et seq post.

2 See para 270 et seq post.

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/A. IN GENERAL/264. Redirection of bankrupt's letters etc.

### **264. Redirection of bankrupt's letters etc.**

Where a bankruptcy order has been made<sup>1</sup>, the court may from time to time, on the application of the official receiver, order a postal operator<sup>2</sup> to redirect and send or deliver to the official receiver or otherwise any postal packet<sup>3</sup> which would otherwise be sent or delivered by the postal operator concerned to the bankrupt at such place or places as may be specified in the order<sup>4</sup>. Any such order has effect for such period, not exceeding three months, as may be specified in the order<sup>5</sup>.

1 See para 195 et seq ante.

2 For these purposes, 'postal operator' means a person who provides the service of conveying postal packets from one place to another by post or any of the incidental services of receiving, collecting, sorting and delivering such packets: Postal Services Act 2000 s 125(1) (applied by the Insolvency Act 1986 s 371(1) (as amended: see note 4 infra)). For the meaning of 'postal packet' see note 3 infra.

3 For these purposes, 'postal packet' means a letter, parcel, packet or other article transmissible by post: Postal Services Act 2000 s 125(1) (as applied: see note 2 supra).

4 Insolvency Act 1986 s 371(1) (amended by the Postal Services Act 2000 s 127(4), Sch 8 para 20(a)-(c)). For the prescribed form of order see the Insolvency Rules 1986, SI 1986/1925, r 12.7(1), (2), Sch 4, Form 6.80 (amended by SI 2001/1149). The trustee of the bankrupt's estate has the like power to apply for such an order: see para 468 post. For a consideration of whether a redirection order pursuant to the Insolvency Act 1986 s 371(1) (as so amended) infringes the Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Human Rights Convention') (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 see Application 33274/96 *Foxley v United Kingdom* (2000) 8 BHRC 571, ECtHR (opening of confidential communications with legal advisers violated the Convention for the Protection of Human Rights and Fundamental Freedoms art 8). See also *Singh v Official Receiver* [1997] BPIR 530 (where the court expressed reservations about the manner of obtaining such orders). An application under the Insolvency Act 1986 s 371 (as amended) must, in the case of the official receiver, be supported by a report and in the case of the trustee by an affidavit: see the Insolvency Rules 1986, SI 1986/1925, r 7.8(1) and para 792 post; cf r 7.57(5) (as substituted) and para 793 post. As to the use of witness statements instead of affidavits in insolvency proceedings see r 7.57(5), (6) (as substituted); and para 793 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 371 (as amended) applies: Administration of

Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 Insolventy Act 1986 s 371(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **264 Redirection of bankrupt's letters etc**

NOTE 4--An application for an order under the 1986 Act s 371(1) by the official receiver or trustee in bankruptcy must be made without notice to the bankrupt or any other person, unless the court directs otherwise: SI 1986/1925 r 6.235A(1), (2) (r 6.235A added by SI 2005/527). Where the applicant is the official receiver, he must file a report with his application, and where the applicant is the trustee in bankruptcy, he must file an affidavit, setting out the reasons why such an order is sought, with his application: SI 1986/1925 r 6.235A(3). The court must fix a venue for the hearing of the application if it thinks fit and give notice to the applicant, and may make an order on such conditions as it thinks fit: r 6.235A(4), (5). The order must identify the person on whom it is to be served, and need not be served on the bankrupt unless the court directs otherwise: r 6.235A(6). Sch 4 Form 6.80 substituted: SI 2005/527.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/B. FIRST MEETING OF CREDITORS/265. First meeting of creditors.

## ***B. FIRST MEETING OF CREDITORS***

### **265. First meeting of creditors.**

Where a bankruptcy order has been made<sup>1</sup> and no certificate for the summary administration of the bankrupt's estate has been issued<sup>2</sup>, it is the duty of the official receiver, as soon as practicable in the period of 12 weeks beginning with the day on which the order was made, to decide whether to summon a general meeting of the bankrupt's creditors for the purpose of appointing a trustee of the bankrupt's estate<sup>3</sup>. If the official receiver decides not to summon such a meeting, he must, before the end of the period of 12 weeks above mentioned, give notice of his decision to the court and to every creditor of the bankrupt who is known to the official receiver or is identified in the bankrupt's statement of affairs; and, as from the giving of such a notice, the official receiver is the trustee of the bankrupt's estate<sup>4</sup>.

<sup>1</sup> As to bankruptcy orders see para 195 et seq ante.

<sup>2</sup> Ie under the Insolvency Act 1986 s 275: see para 206 et seq ante.

<sup>3</sup> Ibid s 293(1). Section 293 does not apply where the bankruptcy order was made on a petition under s 264(1)(d) (see para 124 head (4) ante); and it is subject to s 294(3) (see para 267 post) and s 297(6) (see para

322 post): s 293(1). As to the prospective repeal of s 264(1)(d), and as to the prospective amendment of s 293(1), see para 844 note 2 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, ss 292-302 apply, except s 297(4), with the modification that, where a meeting of creditors is summoned for the purposes of any provision in ss 292-302, the rules regarding the trustee in bankruptcy and the creditors' committee apply accordingly: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 18. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

As to the modification of the Insolvency Act 1986 s 293 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1231, 1276.

4 Insolvency Act 1986 s 293(2), (3).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 265 First meeting of creditors

TEXT AND NOTE 2--Omit words 'and no certificate ... has been issued': 1986 Act s 293(1) (amended by the Enterprise Act 2002 Sch 23 para 7, Sch 26).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/B. FIRST MEETING OF CREDITORS/266. Procedure.

### 266. Procedure.

If<sup>1</sup> the official receiver decides to summon a meeting of creditors, he must fix a venue<sup>2</sup> for the meeting, not more than four months from the date of the bankruptcy order<sup>3</sup>. When a venue has been so fixed, notice of the meeting must be given to the court, and to every creditor of the bankrupt who is known to the official receiver or is identified in the bankrupt's statement of affairs<sup>4</sup>. Notice to the court must be given forthwith; and the notice to creditors must be given at least 21 days before the date fixed for the meeting<sup>5</sup>.

The notice to creditors must specify a time and date, not more than four days before the date fixed for the meeting, by which they must lodge proofs and, if applicable, proxies, in order to be entitled to vote at the meeting<sup>6</sup>; and notice of the meeting must also be given by public advertisement<sup>7</sup>.

1 Ie under the Insolvency Act 1986 s 293(1): see para 265 ante.

2 For the meaning of 'venue' see para 84 note 21 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.79(1).

4 Ibid r 6.79(2).

5 Ibid r 6.79(3).

6 Ibid r 6.79(4).

7 Ibid r 6.79(5).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 266 Procedure

TEXT AND NOTE 7--SI 1986/1925 r 6.79(5) substituted: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/B. FIRST MEETING OF CREDITORS/267. Power of creditors to requisition meeting.

### 267. Power of creditors to requisition meeting.

Where, in the case of any bankruptcy:

- 438 (1) the official receiver has not yet summoned, or has decided not to summon, a general meeting of the bankrupt's creditors for the purpose of appointing the trustee<sup>1</sup>; and
- 439 (2) a certificate for the summary administration of the estate is not for the time being in force<sup>2</sup>,

any creditor of the bankrupt may request the official receiver to summon such a meeting for that purpose<sup>3</sup>.

If such a request appears to the official receiver to be made with the concurrence of not less than one-quarter, in value, of the bankrupt's creditors, including the creditor making the request, it is the duty of the official receiver to summon the requested meeting<sup>4</sup>.

Where the official receiver receives such a request by a creditor and it appears to him that the request is properly made, he must:

- 440 (a) withdraw any notice already given by him<sup>5</sup> that he has decided not to summon such a meeting; and
- 441 (b) fix the venue<sup>6</sup> of the meeting for not more than three months from his receipt of the creditor's request; and
- 442 (c) act<sup>7</sup> as if he had decided<sup>8</sup> to summon the meeting<sup>9</sup>.

A meeting summoned by the official receiver<sup>10</sup> is known as 'the first meeting of creditors'<sup>11</sup>.

1 le under the Insolvency Act 1986 s 293: see para 265 ante.

2 le under *ibid* s 275: see para 206 et seq ante.

3 *Ibid* s 294(1). As to the application of s 294 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

As to the modification of s 294 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and *COMPANY AND PARTNERSHIP INSOLVENCY* vol 7(4) (2004 Reissue) para 1276.

4 Insolvency Act 1986 s 294(2). Accordingly, where the duty imposed by s 294(2) has arisen, the official receiver is required neither to reach a decision for the purposes of s 293(1) (see para 265 ante) nor, if he has reached one, to serve any notice under s 293(2) (see para 265 ante): s 294(3).

5 le under *ibid* s 293(2): see para 265 ante.

6 For the meaning of 'venue' see para 84 note 21 ante.

7 le in accordance with the Insolvency Rules 1986, SI 1986/1925, r 6.79(2)-(5): see para 266 ante.

8 le under the Insolvency Act 1986 s 293(1): see para 265 ante.

9 Insolvency Rules 1986, SI 1986/1925, r 6.79(6).

10 le under the Insolvency Act 1986 s 293 (see para 265 ante) or s 294 (see *supra*).

11 Insolvency Rules 1986, SI 1986/1925, r 6.79(7).

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in *PARA 2 NOTE 5*.

### **267 Power of creditors to requisition meeting**

TEXT AND NOTE 2--Head (2) omitted: 1986 Act s 294(1) (amended by the Enterprise Act 2002 Sch 23 para 8, Sch 26).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/B. FIRST MEETING OF CREDITORS/268. Business at first meeting.

### **268. Business at first meeting.**

At the first meeting of creditors<sup>1</sup>, no resolutions may be taken other than the following:

443 (1) a resolution to appoint a named insolvency practitioner<sup>2</sup> to be trustee in bankruptcy<sup>3</sup> or two or more named insolvency practitioners as joint trustees;

444 (2) a resolution to establish a creditors' committee<sup>4</sup>;

445 (3) unless it has been resolved to establish a creditors' committee, a resolution specifying the terms on which the trustee is to be remunerated<sup>5</sup>, or to defer consideration of that matter;

- 446 (4) if, and only if, two or more persons are appointed to act jointly as trustee, a resolution specifying whether acts are to be done by both or all of them, or by only one;
- 447 (5) where the meeting has been requisitioned by creditors<sup>6</sup>, a resolution authorising payment out of the estate, as an expense of the bankruptcy, of the cost of summoning and holding the meeting;
- 448 (6) a resolution to adjourn the meeting for not more than three weeks;
- 449 (7) any other resolution which the chairman thinks it right to allow for special reasons<sup>7</sup>.

No resolution may be proposed which has for its object the appointment of the official receiver as trustee<sup>8</sup>.

- 1 For the meaning of 'the first meeting of creditors' see para 267 ante.
- 2 As to insolvency practitioners and their qualification see para 42 et seq ante.
- 3 As to the trustee in bankruptcy see para 316 et seq post.
- 4 As to the creditors' committee see para 328 et seq post.
- 5 As to the trustee's remuneration see para 351 et seq post.
- 6 I.e. under the Insolvency Act 1986 s 294: see para 267 ante.
- 7 Insolvency Rules 1986, SI 1986/1925, r 6.80(1).
- 8 Ibid r 6.80(2).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/B. FIRST MEETING OF CREDITORS/269. Failure of meeting to appoint trustee.

### 269. Failure of meeting to appoint trustee.

If a meeting summoned by the official receiver<sup>1</sup> is held but no appointment of a person as trustee is made, it is the duty of the official receiver to decide whether to refer the need for an appointment to the Secretary of State<sup>2</sup>; and, on a reference made in pursuance of that decision, the Secretary of State must either make an appointment or decline to make one<sup>3</sup>.

- 1 I.e. under the Insolvency Act 1986 s 293 (see para 265 ante) or s 294 (see para 267 ante).
- 2 Ibid s 295(1). As to the application of s 295 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.



As to the modification of s 295 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1232, 1277.

3 Insolvency Act 1986 s 295(2). If the official receiver decides not to refer the need for an appointment to the Secretary of State or, on such a reference, the Secretary of State declines to make an appointment, the official receiver must give notice of his decision or, as the case may be, of the Secretary of State's decision to the court: s 295(3). As from the giving of notice under s 295(3) in a case in which no notice has been given under s 293(2) (see para 265 ante), the official receiver is trustee of the bankrupt's estate: s 295(4).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/270. General power to call meetings.

## ***C. MEETINGS OF CREDITORS***

### **270. General power to call meetings.**

The official receiver may at any time summon and conduct meetings of creditors for the purpose of ascertaining their wishes in all matters relating to the bankruptcy<sup>1</sup>.

When a venue<sup>2</sup> for the meeting has been fixed, notice of the meeting must be given by the person summoning it to every creditor who is known to him or is identified in the bankrupt's statement of affairs<sup>3</sup>; and the notice must be given at least 21 days before the date fixed for the meeting<sup>4</sup>.

The notice to creditors must specify the purpose for which the meeting is summoned, and a time and date, not more than four days before the meeting, by which creditors must lodge proxies<sup>5</sup> and those who have not already lodged proofs<sup>6</sup> must do so, in order to be entitled to vote at the meeting<sup>7</sup>.

Additional notice of the meeting may be given by public advertisement if the convener thinks fit, and must be so given if the court so orders<sup>8</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.81(1). In relation to any meeting of creditors, the person summoning it is known as 'the convener': r 6.81(1). The trustee has the like power to summon meetings of creditors: see para 463 post.

2 For the meaning of 'venue' see para 84 note 21 ante.

3 As to the statement of affairs see para 244 et seq ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.81(2). For the prescribed form of notice see rr 6.81, 12.7(1), (2), Sch 4, Form 6.35.

5 As to proxies see para 278 et seq post.

6 As to proofs of debt see para 490 et seq post.

7 Insolvency Rules 1986, SI 1986/1925, r 6.81(3).

8 Ibid r 6.81(4).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **270 General power to call meetings**

TEXT AND NOTE 8--SI 1986/1925 r 6.81(4) substituted: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/271. Chairman at meetings.

### **271. Chairman at meetings.**

Where the convener<sup>1</sup> of a meeting is the official receiver, he, or a person nominated by him, must be chairman; and a nomination must be in writing, unless the nominee is another official receiver or a deputy official receiver<sup>2</sup>. Where the convener is other than the official receiver, the chairman must be he, or a person nominated by him in writing to act; and a person so nominated must be either one who is qualified to act as an insolvency practitioner in relation to the bankrupt<sup>3</sup>, or an employee of the trustee or his firm who is experienced in insolvency matters<sup>4</sup>.

1 For the meaning of 'the convener' see para 270 note 1 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.82(1).

3 As to insolvency practitioners and their qualification see para 42 et seq ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.82(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF

BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/272. Requisitioned meetings.

## **272. Requisitioned meetings.**

A request by creditors to the official receiver for a meeting of creditors to be summoned must be accompanied by:

- 450 (1) a list of the creditors concurring with the request and the amount of their respective claims in the bankruptcy;
- 451 (2) from each creditor concurring, written confirmation of his concurrence; and
- 452 (3) a statement of the purpose of the proposed meeting<sup>1</sup>;

but the requirements of heads (1) and (2) above do not apply if the requisitioning creditor's debt is alone sufficient, without the concurrence of other creditors<sup>2</sup>.

If the official receiver considers the request to be properly made, he must fix a venue<sup>3</sup> for the meeting, to take place not more than 35 days from the receipt of the request, and give 21 days' notice of the meeting, and of the venue for it, to creditors<sup>4</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.83(1). For the prescribed form of request by creditors for a meeting see rr 6.83, 12.7(1), (2), Sch 4, Form 6.34. Where a request for a creditors' meeting is made to the trustee, r 6.83 applies to him as it does to the official receiver: r 6.83(3).

2 Ibid r 6.83(1).

3 For the meaning of 'venue' see para 84 note 21 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.83(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **272 Requisitioned meetings**

TEXT AND NOTES--SI 1986/1925 r 6.83 does not apply to voluntary arrangements under the Insolvency Act 1986 s 263A (see PARA 123A): SI 1986/1925 r 6.83(4) (added by SI 2003/1730).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/273. Attendance of bankrupt etc at meetings.

## **273. Attendance of bankrupt etc at meetings.**

Whenever a meeting of creditors is summoned, the convener<sup>1</sup> must give at least 21 days' notice of the meeting to the bankrupt<sup>2</sup>. If the meeting is adjourned, the chairman of the meeting must, unless for any reason it appears to him to be unnecessary or impracticable, give notice of the fact to the bankrupt, if the latter was not himself present at the meeting<sup>3</sup>.

If the convener thinks fit, he may give notice to the bankrupt that he, the bankrupt, is required to be present, or in attendance<sup>4</sup>.

In the case of any meeting, the bankrupt or any other person may, if he has given reasonable notice of his wish to be present, be admitted; but this is at the discretion of the chairman<sup>5</sup>. The chairman's decision is final as to what, if any, intervention may be made by the bankrupt, or by any other person admitted to the meeting under the above provisions<sup>5</sup>.

If the bankrupt is not present, and it is desired to put questions to him, the chairman may adjourn the meeting with a view to obtaining his attendance<sup>6</sup>. Where the bankrupt is present at a creditors' meeting, only such questions may be put to him as the chairman may in his discretion allow<sup>7</sup>.

1 For the meaning of 'the convener' see para 270 note 1 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.84(1). For the prescribed form of notice see rr 6.84, 12.7(1), (2), Sch 4, Form 6.36.

3 Ibid r 6.84(2).

4 Ibid r 6.84(3).

5 Ibid r 6.84(4).

6 Ibid r 6.84(5). As to adjournment see para 286 post.

7 Ibid r 6.84(6).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/274. Notice of meetings by advertisement only.

### 274. Notice of meetings by advertisement only.

In the case of any meeting to be held<sup>1</sup>, the court may order that notice of it be given by public advertisement, and not by individual notice to the persons concerned<sup>2</sup>. In considering whether to act under the above provisions, the court must have regard to the cost of public advertisement, to the amount of the funds available in the estate, and to the extent of the interest of creditors or any particular class of them<sup>3</sup>.

1 ie under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 Ibid r 6.85(1).

3 Ibid r 6.85(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/275. Venue of meetings.

### **275. Venue of meetings.**

In fixing the venue<sup>1</sup> for a meeting of creditors, the person summoning the meeting must have regard to the convenience of the creditors<sup>2</sup>. Meetings must in all cases be summoned for commencement between the hours of 10.00 and 16.00 hours on a business day<sup>3</sup>, unless the court otherwise directs<sup>4</sup>. With every notice summoning a creditors' meeting there must be sent out forms of proxy<sup>5</sup>.

1 For the meaning of 'venue' see para 84 note 21 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.86(1).

3 For the meaning of 'business day' see para 95 note 11 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.86(2).

5 Ibid r 6.86(3). For the prescribed form of proxy see rr 6.86, 12.7(1), (2), Sch 4, Form 8.4. As to proxies see para 278 et seq post.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/276. Expenses of summoning meetings.

### **276. Expenses of summoning meetings.**

The expenses of summoning and holding a meeting of creditors at the instance of any person other than the official receiver or the trustee must be paid by that person, who must deposit security for their payment with the trustee or, if no trustee has been appointed, with the official receiver<sup>1</sup>. The sum to be deposited must be such as the trustee or, as the case may be, the official receiver determines to be appropriate; and neither may act without the deposit having been made<sup>2</sup>.

Where a meeting is so summoned, it may vote that the expenses of summoning and holding it are to be payable out of the estate, as an expense of the bankruptcy<sup>3</sup>.

To the extent that any deposit so made is not required for the payment of expenses of summoning and holding the meeting, it must be repaid to the person who made it<sup>4</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.87(1).

2 Ibid r 6.87(2).

3 Ibid r 6.87(3).

4 Ibid r 6.87(4).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/277. Resolutions.

## **277. Resolutions.**

At a meeting of creditors, a resolution is passed when a majority, in value, of those present and voting, in person or by proxy<sup>1</sup>, have voted in favour of the resolution<sup>2</sup>. However, in the case of a resolution for the appointment of a trustee:

- 453 (1) if on any vote there are two nominees for appointment, the person who obtains the most support is appointed, provided that such support represents a majority in value of all those present, in person or by proxy, at the meeting and entitled to vote;
- 454 (2) if there are three or more nominees, and one of them has a clear majority over both or all the others together, that one is appointed; and
- 455 (3) in any other case, the chairman must continue to take votes, disregarding at each vote any nominee who has withdrawn and, if no nominee has withdrawn, the nominee who obtained the least support last time, until a clear majority is obtained for any one nominee<sup>3</sup>.

The chairman may at any time put to the meeting a resolution for the joint appointment of any two or more nominees<sup>4</sup>.

Where a resolution is proposed which affects a person in respect of his remuneration or conduct as trustee, or as proposed or former trustee, the vote of that person, and of any partner or employee of his, may not be reckoned in the majority required for passing the resolution; and this provision applies with respect to a vote given by a person, whether personally or on his behalf by a proxy-holder, either as creditor or as proxy-holder for a creditor<sup>5</sup>.

1 As to proxies see para 278 et seq post.

2 Insolvency Rules 1986, SI 1986/1925, r 6.88(1) (amended by SI 1987/1919).

3 Insolvency Rules 1986, SI 1986/1925, r 6.88(2) (amended by SI 1987/1919).

4 Insolvency Rules 1986, SI 1986/1925, r 6.88(3).

5 Ibid r 6.88(4) (amended by SI 1987/1919). The Insolvency Rules 1986, SI 1986/1925, r 6.88(4) (as so amended) is subject to r 8.6 (as amended) (see para 282 post): r 6.88(4) (as so amended).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 277 Resolutions

TEXT AND NOTES--See SI 1986/1925 r 6.88A (resolutions by correspondence) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/278. Proxies.

### 278. Proxies.

A proxy is an authority given by a person ('the principal') to another person ('the proxy-holder') to attend a meeting and speak and vote as his representative<sup>1</sup>. Proxies are for use at creditors' meetings<sup>2</sup>.

Only one proxy may be given by a person for any one meeting at which he desires to be represented, and it may only be given to one person, being an individual aged 18 or over; but the principal may specify one or more other such individuals to be proxy-holder in the alternative, in the order in which they are named in the proxy<sup>3</sup>. A proxy for a particular meeting may<sup>4</sup> be given to whoever is to be the chairman of the meeting<sup>5</sup>; and for a meeting held as part of the proceedings in a bankruptcy it may be given to the official receiver<sup>6</sup>. Where the chairman or official receiver is given such a proxy, he cannot decline to be the proxy-holder in relation to that proxy<sup>7</sup>.

A proxy requires the holder to give the principal's vote on matters arising for determination at the meeting, or to abstain, or to propose, in the principal's name, a resolution to be voted on by the meeting, either as directed or in accordance with the holder's own discretion<sup>8</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 8.1(1).

2 Ibid r 8.1(2) (amended by SI 1987/1919). The meetings referred to are those summoned or called under the Insolventcy Act 1986 or the Insolventcy Rules 1986, SI 1986/1925 (as amended): r 8.1(2) (as so amended). For the prescribed form of proxy in a bankruptcy see rr 8.1, 12.7(1), (2), Sch 4, Form 8.4.

3 Ibid r 8.1(3).

4 Ie without prejudice to the generality of ibid r 8.1(3): see *supra*.

5 As to the chairman at creditors' meetings in a bankruptcy see para 271 ante; and as to the chairman as proxy-holder see para 284 post.

6 Insolventcy Rules 1986, SI 1986/1925, r 8.1(4).

7 Ibid r 8.1(5) (substituted by SI 1987/1919).

8 Insolventcy Rules 1986, SI 1986/1925, r 8.1(6) (added by SI 1987/1919).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 279. Issue and use of forms.

When notice is given of a meeting to be held in insolventcy proceedings<sup>1</sup>, and forms of proxy are sent out with the notice, no form so sent out may have inserted in it the name or description of any person<sup>2</sup>; and no form of proxy may be used at any meeting except that which is sent out with the notice summoning the meeting, or a substantially similar form<sup>3</sup>. A form of proxy must be signed by the principal<sup>4</sup>, or by some person authorised by him, either generally or with reference to a particular meeting; and, if the form is signed by a person other than the principal, the nature of the person's authority must be stated<sup>5</sup>.

1 For the meaning of 'insolventcy proceedings' see para 35 note 4 ante.

2 Insolventcy Rules 1986, SI 1986/1925, r 8.2(1). As to the sending of forms of proxies with the notice of a creditors' meeting in a bankruptcy see para 275 ante.

3 Ibid r 8.2(2).

4 For the meaning of 'the principal' see para 278 ante.



5 Insolvency Rules 1986, SI 1986/1925, r 8.2(3). For the meaning of 'signed', and as to the validity of faxed proofs, see *Re a Debtor (No 2021 of 1995)*, ex p *IRC v Debtor*, *Re a Debtor (No 2022 of 1995)*, ex p *IRC v Debtor* [1996] 2 All ER 345, [1996] 1 BCLC 538.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/280. Use of proxies at meetings.

### 280. Use of proxies at meetings.

A proxy given for a particular meeting may be used at any adjournment of that meeting<sup>1</sup>. Where the official receiver holds proxies for use at any meeting, his deputy, or any other official receiver, may act as proxy-holder<sup>2</sup> in his place; alternatively, the official receiver may in writing authorise another officer of the Department of Trade and Industry to act for him at the meeting and use the proxies as if that other officer were himself proxy-holder<sup>3</sup>. Where the responsible insolvency practitioner<sup>4</sup> holds proxies to be used by him as chairman of a meeting, and some other person acts as chairman, the other person may use the insolvency practitioner's proxies as if he were himself proxy-holder<sup>5</sup>.

Where a proxy directs a proxy-holder to vote for or against a resolution for the nomination or appointment of a person as the responsible insolvency practitioner, the proxy-holder may, unless the proxy states otherwise, vote for or against, as he thinks fit, any resolution for the nomination or appointment of that person jointly with another or others<sup>6</sup>.

A proxy-holder may propose any resolution which, if proposed by another, would be a resolution in favour of which, by virtue of the proxy, he would be entitled to vote<sup>7</sup>. Where a proxy gives specific directions as to voting, this does not, unless the proxy states otherwise, preclude the proxy-holder from voting at his discretion on resolutions put to the meeting which are not dealt with in the proxy<sup>8</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 8.3(1).

2 For the meaning of 'the proxy-holder' see para 278 ante.

3 Insolvency Rules 1986, SI 1986/1925, rr 8.3(2), 13.13(2).

4 For the meaning of 'responsible insolvency practitioner' see para 21 note 6 ante.

5 Insolvency Rules 1986, SI 1986/1925, r 8.3(3).

6 Ibid r 8.3(4) (added by SI 1987/1919).

7 Insolvency Rules 1986, SI 1986/1925, r 8.3(5) (added by SI 1987/1919).

8 Insolvency Rules 1986, SI 1986/1925, r 8.3(6) (added by SI 1987/1919).

## UPDATE

## **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **280 Use of proxies at meetings**

TEXT AND NOTE 3--For 'Department of Trade and Industry' read 'Department for Business, Innovation and Skills': SI 1986/1925 r 13.13(2) (amended by SI 2009/2748).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/281. Retention and inspection of proxies.

### **281. Retention and inspection of proxies.**

Proxies used for voting at any meeting must be retained by the chairman of the meeting<sup>1</sup>. The chairman must, however, deliver the proxies, forthwith after the meeting, to the responsible insolvency practitioner<sup>2</sup>, where that is someone other than himself<sup>3</sup>.

The responsible insolvency practitioner must, so long as proxies lodged with him are in his hands, allow them to be inspected, at all reasonable times on any business day<sup>4</sup>, by the creditors<sup>5</sup>. Such right of inspection is also exercisable, in the case of an insolvent individual, by him<sup>6</sup>.

Any person attending a meeting of creditors is entitled, immediately before or in the course of the meeting, to inspect proxies and associated documents, including proofs, sent or given, in accordance with directions contained in any notice convening the meeting, to the chairman of that meeting or to any other person by a creditor for the purpose of that meeting<sup>7</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 8.4(1). As to the chairman at meetings see para 271 ante.

2 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 8.4(2).

4 For the meaning of 'business day' see para 95 note 11 ante.

5 Insolvency Rules 1986, SI 1986/1925, r 8.5(1)(a). For these purposes, 'creditors' means, in the case of an individual's bankruptcy, those creditors who have proved their debts, and, in any other case, persons who have submitted in writing a claim to be creditors of the individual concerned; but in neither case does it include a person whose proof has been wholly rejected for purposes of voting, dividend or otherwise: r 8.5(2). As to proofs of debt see para 490 et seq post.

6 Ibid r 8.5(3)(b).

7 Ibid r 8.5(4) (amended by SI 1987/1919).

## **UPDATE**

## **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/282. Proxy-holder with financial interest.

## **282. Proxy-holder with financial interest.**

A proxy-holder<sup>1</sup> may not vote in favour of any resolution which would directly or indirectly place him, or any associate<sup>2</sup> of his, in a position to receive any remuneration out of the bankrupt's estate, unless the proxy specifically directs him to vote in that way<sup>3</sup>. Where a proxy-holder has signed the proxy as being authorised to do so by his principal<sup>4</sup> and the proxy specifically directs him to vote in that way, he may nevertheless not vote in that way unless he produces to the chairman of the meeting written authorisation from his principal sufficient to show that the proxy-holder was entitled so to sign the proxy<sup>5</sup>.

The above provisions apply also to any person acting as chairman of a meeting and using proxies in that capacity<sup>6</sup>; and in their application to him, the proxy-holder is deemed an associate of his<sup>7</sup>.

1 For the meaning of 'the proxy-holder' see para 278 ante.

2 For the meaning of 'associate' see para 5 ante.

3 Insolvency Rules 1986, SI 1986/1925, rr 8.6(1), 13.8(b).

4 For the meaning of 'the principal' see para 278 ante.

5 Insolvency Rules 1986, SI 1986/1925, r 8.6(1A) (added by SI 1987/1919).

6 *Ie* under the Insolvency Rules 1986, SI 1986/1925, r 8.3 (as amended): see para 280 ante.

7 *Ibid* r 8.6(2) (amended by SI 1987/1919).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/283. Rule against solicitation in obtaining proxies.

## **283. Rule against solicitation in obtaining proxies.**

Where the court is satisfied that any improper solicitation has been used by or on behalf of the trustee in obtaining proxies, it may order that no remuneration out of the assets be allowed to any person by whom, or on whose behalf, the solicitation was exercised<sup>1</sup>. Such an order of the court overrides any resolution of the creditors' committee or the creditors, or any other provision<sup>2</sup> relating to the trustee's remuneration<sup>3</sup>.

1 Insolventy Rules 1986, SI 1986/1925, r 6.148(1). As to improper solicitation in procuring the trustee's appointment see para 349 post. For the meaning of 'trustee' see para 21 note 6 ante.

2 le of the Insolventy Rules 1986, SI 1986/1925 (as amended). As to the provisions relating to the trustee's remuneration see para 351 et seq post.

3 Ibid r 6.148(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolventy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/284. Chairman of meeting as proxy-holder.

#### **284. Chairman of meeting as proxy-holder.**

Where the chairman at a meeting holds a proxy for a creditor, which requires him to vote for a particular resolution, and no other person proposes that resolution, he must himself propose it, unless he considers that there is good reason for not doing so; and, if he does not propose it, he must forthwith after the meeting notify the principal of the reason why not<sup>1</sup>.

1 Insolventy Rules 1986, SI 1986/1925, r 6.89.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolventy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/285. Suspension of meeting.

## **285. Suspension of meeting.**

Once only in the course of any meeting, the chairman may, in his discretion and without an adjournment, declare the meeting suspended for any period of up to one hour<sup>1</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.90.

### **UPDATE**

#### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/286. Adjournment.

## **286. Adjournment.**

The chairman at any meeting may, in his discretion, and must, if the meeting so resolves, adjourn it to such time and place as seems to him to be appropriate in the circumstances<sup>1</sup>. If, within 30 minutes from the time appointed for the commencement of a meeting, a quorum is not present, then the chairman may, at his discretion, adjourn the meeting to such time and place as he may appoint<sup>2</sup>; and any such adjournment may not be for a period of more than 21 days<sup>3</sup>.

If there is no person present to act as chairman, some other person present, being entitled to vote, may make the appointment for an adjournment<sup>4</sup> with the agreement of others present, being persons so entitled; and, failing agreement, the adjournment must be to the same time and place in the next following week, or, if that is not a business day<sup>5</sup>, to the business day immediately following<sup>6</sup>. Where a meeting is so adjourned, proofs<sup>7</sup> and proxies<sup>8</sup> may be used if lodged at any time up to midday on the business day immediately before the adjourned meeting<sup>9</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.91(1). Rule 6.91(1) is subject to r 6.129(3) (see para 362 post) in a case where the trustee or his nominee is chairman and a resolution has been proposed for the trustee's removal: r 6.91(1).

2 Ibid r 6.91(2) (amended by SI 1987/1919).

3 Insolvency Rules 1986, SI 1986/1925, r 6.91(3). Rule 6.86(1), (2) (see para 275 ante) applies with regard to the venue of the adjourned meeting: r 6.91(3). For the meaning of 'venue' see para 84 note 21 ante.

4 Ie under ibid r 6.91(2): see supra.

5 For the meaning of 'business day' see para 95 note 11 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 6.91(4).

7 As to proofs of debt see para 490 et seq post.

- 8 As to proxies see para 278 et seq ante.
- 9 Insolvency Rules 1986, SI 1986/1925, r 6.91(5).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/287. Quorum.

### **287. Quorum.**

Any meeting of creditors is competent to act if a quorum is present<sup>1</sup>. A quorum is at least one creditor entitled to vote<sup>2</sup>. For these purposes, however, the reference to the creditor necessary to constitute a quorum is to those persons present or represented by proxy by any person including the chairman<sup>3</sup>.

Where, at any meeting of creditors, the above provisions as to a quorum being present are satisfied by the attendance of the chairman alone, or one other person in addition to the chairman, and the chairman is aware, by virtue of proofs and proxies received or otherwise, that one or more additional persons would, if attending, be entitled to vote, the meeting may not commence until at least the expiry of 15 minutes after the time appointed for its commencement<sup>4</sup>.

- 1 Insolvency Rules 1986, SI 1986/1925, r 12.4A(1) (added by SI 1987/1919).
- 2 Insolvency Rules 1986, SI 1986/1925, r 12.4A(2)(a) (added by SI 1987/1919).
- 3 Insolvency Rules 1986, SI 1986/1925, r 12.4A(3) (added by SI 1987/1919).
- 4 Insolvency Rules 1986, SI 1986/1925, r 12.4A(4) (added by SI 1987/1919).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/288. Creditors' entitlement to vote; lodging of proofs.

## 288. Creditors' entitlement to vote; lodging of proofs.

At a meeting of creditors a person is entitled to vote as a creditor only if:

- 456 (1) there has been duly lodged, by the time and date stated in the notice of the meeting<sup>1</sup>, a proof of the debt claimed to be due to him from the bankrupt<sup>2</sup>, and the claim has been admitted for the purpose of entitlement to vote<sup>3</sup>; and
- 457 (2) there has been lodged, by the time and date stated in the notice of the meeting, any proxy<sup>4</sup> requisite for that entitlement<sup>5</sup>.

The court may, in exceptional circumstances, by order declare the creditors, or any class of them, entitled to vote at creditors' meetings, without being required to prove their debts; and, where a creditor is so entitled, the court may, on the application of the trustee, make such consequential orders as it thinks fit, as, for example, an order treating a creditor as having proved his debt for the purpose of permitting payment of dividend<sup>6</sup>.

A creditor may not vote in respect of a debt for an unliquidated amount<sup>7</sup>, or any debt whose value is not ascertained, except where the chairman agrees to put on the debt an estimated minimum value for the purpose of entitlement to vote and admits his proof for that purpose<sup>8</sup>.

A secured creditor<sup>9</sup> is entitled to vote only in respect of the balance, if any, of his debt after deducting the value of his security as estimated by him<sup>10</sup>.

A creditor may not vote in respect of a debt on, or secured by, a current bill of exchange or promissory note, unless he is willing:

- 458 (a) to treat the liability to him on the bill or note of every person who is liable on it antecedently to the bankrupt, and against whom a bankruptcy order has not been made (or, in the case of a company, which has not gone into liquidation), as a security in his hands; and
- 459 (b) to estimate the value of the security and (for the purpose of entitlement to vote, but not for dividend) to deduct it from his proof<sup>11</sup>.

The chairman's decision in respect of any matter arising under the above provisions is subject to appeal to the court by any creditor, or by the bankrupt<sup>12</sup>.

1 As to notice of the meeting see para 275 ante.

2 As to proofs of debt see para 490 et seq post.

3 Ie under the Insolvency Rules 1986, SI 1986/1925, r 6.94: see para 289 post.

4 As to proxies see para 278 et seq ante.

5 Insolvency Rules 1986, SI 1986/1925, r 6.93(1).

6 Ibid r 6.93(2). For the meaning of references to the trustee see para 21 note 6 ante.

7 'Unliquidated debt' includes not only all cases of damages to be ascertained, but also extends to any debt where the creditor fairly admits that he cannot state the amount: see *Re Canadian Pacific Colonization Corp'n Ltd* (1891) 40 WR 40 at 41 (company case), distinguishing and explaining *Re Dummelow, ex p Ruffle* (1873) 8 Ch App 997. For the meaning of 'bankruptcy debt' see para 491 post.

8 Insolvency Rules 1986, SI 1986/1925, r 6.93(3). As to the estimation of disputed debts for voting purposes see *Re a Debtor (No 222 of 1990), ex p Bank of Ireland* [1992] BCLC 137 (decided under the similar wording in the Insolvency Rules 1986, SI 1986/1925, r 5.17(3)); *Re A Company (No 004539 of 1993)* [1995] 1 BCLC 459,

[1995] BCC 116; *Re A Debtor (No 574 of 1995)* [1998] 2 BCLC 124, sub nom *National Westminster Bank plc v Scher* [1998] BPIR 224. See further para 101 ante.

9 As to secured creditors see para 560 post.

10 Insolvency Rules 1986, SI 1986/1925, r 6.93(4). As to proprietary claims see *Re Prime Metal Trading Ltd* [1984] BCLC 543, 1 BCC 265.

11 Insolvency Rules 1986, SI 1986/1925, r 6.93(5).

12 Ibid r 6.94(2). As to appeals see para 739 et seq post.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 288 Creditors' entitlement to vote; lodging of proofs

TEXT AND NOTES--See SI 1986/1925 r 6.93A (chairman's discretion to allow vote) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/289. Admission and rejection of proof.

### 289. Admission and rejection of proof.

At any creditors' meeting the chairman has power to admit or reject a creditor's proof for the purpose of his entitlement to vote; and the power is exercisable with respect to the whole or any part of the proof<sup>1</sup>. The chairman's decision under this provision is subject to appeal to the court by any creditor or by the bankrupt<sup>2</sup>. If the chairman is in doubt whether a proof should be admitted or rejected, he must mark it as objected to and allow the creditor to vote, subject to his vote being subsequently declared invalid if the objection to the proof is sustained<sup>3</sup>.

If, on appeal, the chairman's decision is reversed or varied, or a creditor's vote is declared invalid, the court may order that another meeting be summoned, or make such other order as it thinks just<sup>4</sup>. Neither the official receiver, nor any person nominated by him to be chairman, is personally liable for costs incurred by any person in respect of an application under these provisions; and the chairman, if other than the official receiver or a person so nominated, is not so liable, unless the court makes an order to that effect<sup>5</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.94(1). As to proofs of debt see para 490 et seq post.

2 Ibid r 6.94(2). As to appeals see para 739 et seq post. As to the evidence admissible on appeal over a disputed debt see *Re A Debtor (No 574 of 1995)* [1998] 2 BCLC 124, sub nom *National Westminster Bank plc v Scher* [1998] BPIR 224; *Re A Company (No 004539 of 1993)* [1995] 1 BCLC 459, [1995] BCC 116.

3 Insolvency Rules 1986, SI 1986/1925, r 6.94(3).

4 Ibid r 6.94(4).



5 Ibid r 6.94(5).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(viii) Official Receiver's Powers/C. MEETINGS OF CREDITORS/290. Record of proceedings.

### **290. Record of proceedings.**

The chairman at any creditors' meeting must cause minutes of the proceedings, signed by him, to be retained by him as part of the records of the bankruptcy<sup>1</sup>. He must also cause to be made up and kept a list of all the creditors who attended the meeting<sup>2</sup>. The minutes of the meeting must include a record of every resolution passed; and it is the chairman's duty to see that particulars of all such resolutions, certified by him, are filed in court<sup>3</sup> not more than 21 days after the date of the meeting<sup>4</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.95(1).

2 Ibid r 6.95(2).

3 For the meaning of 'file in court' see para 95 note 10 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.95(3).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(ix) Public Examination/291. Application for public examination.

### **(ix) Public Examination**

#### **291. Application for public examination.**

Where a bankruptcy order has been made<sup>1</sup>, the official receiver may at any time before the discharge of the bankrupt<sup>2</sup> apply to the court for the public examination of the bankrupt<sup>3</sup>.

1 As to bankruptcy orders see para 195 et seq ante.

2 As to discharge from bankruptcy see para 629 et seq post.

3 Insolvency Act 1986 s 290(1).

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(ix) Public Examination/292. Request by creditors for public examination.

### **292. Request by creditors for public examination.**

Unless the court otherwise orders, the official receiver must make an application for a public examination<sup>1</sup> if notice requiring him to do so is given to him<sup>2</sup> by one of the bankrupt's creditors with the concurrence of not less than one-half, in value, of those creditors, including the creditor giving notice<sup>3</sup>.

Such a request<sup>4</sup> by a creditor to the official receiver must be made in writing and be accompanied by a list of the creditors concurring with the request and the amount of their respective claims in the bankruptcy, and from each creditor concurring, written confirmation of his concurrence and a statement of the reasons why the examination is requested; but, if the requisitioning creditor's debt is alone sufficient, the request may be made by that creditor without the concurrence of others<sup>5</sup>. Before an application to the court is made on the request, the requisitionist must deposit with the official receiver such sum as the latter may determine to be appropriate by way of security for the expenses of the hearing of a public examination, if ordered<sup>6</sup>. The official receiver must, within 28 days of receiving the request, make the application to the court<sup>7</sup>, unless he is of opinion that the request is an unreasonable one in the circumstances, in which case he may apply to the court for an order relieving him from the obligation to make the application for a public examination<sup>8</sup>. If the court so orders, and the application for the order was made without notice being served on any other party, notice of the order must be given forthwith by the official receiver to the requisitionist; and, if the application for such an order is dismissed, the official receiver's application for a public examination<sup>9</sup> must be made forthwith on conclusion of the hearing of the application<sup>10</sup>.

1 ie under the Insolvency Act 1986 s 290(1): see para 291 ante.

2 ie in accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended): see infra.

3 Insolvency Act 1986 s 290(2).

4 For the prescribed form of request by creditors see the Insolvency Rules 1986, SI 1986/1925, rr 6.173, 12.7(1), (2), Sch 4, Form 6.56.

5 Ibid r 6.173(1).

6 Ibid r 6.173(2).

7 Ibid r 6.173(3).

8 Ibid r 6.173(4). The official receiver would otherwise be required to make the application under the Insolvency Act 1986 s 290(2): see *supra*.

9 *Ie* under *ibid* s 290(2): see *supra*.

10 Insolvency Rules 1986, SI 1986/1925, r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 6.173(5).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in *PARA 2 NOTE 5*.

### 292 Request by creditors for public examination

*NOTE 10*--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(ix) Public Examination/293. Order for public examination.

### 293. Order for public examination.

On an application by the official receiver for a public examination<sup>1</sup>, the court must direct that a public examination of the bankrupt be held on a day appointed by the court; and the bankrupt must attend on that day and be publicly examined as to his affairs<sup>2</sup>, dealings and property<sup>3</sup>.

If the official receiver applies to the court for the public examination of the bankrupt, a copy of the court's order<sup>4</sup> must, forthwith after its making, be sent by the official receiver to the bankrupt<sup>5</sup>.

1 See para 291 *ante*.

2 For the meaning of references to a person's affairs see para 81 note 4 *ante*.

3 Insolvency Act 1986 s 290(3). For the meaning of 'property' see para 400 *post*. As to the modification of s 290 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 822 *post*; and *COMPANY AND PARTNERSHIP INSOLVENCY* vol 7(4) (2004 Reissue) para 1274.

4 For the prescribed form of order see the Insolvency Rules 1986, SI 1986/1925, rr 6.172, 12.7(1), (2), Sch 4, Form 6.55 (substituted by SI 1987/1919).

5 Insolvency Rules 1986, SI 1986/1925, r 6.172(1).

**UPDATE****216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(ix) Public Examination/294. Notice of hearing.

**294. Notice of hearing.**

The court's order for a public examination of the bankrupt<sup>1</sup> must appoint a venue<sup>2</sup> for the hearing and direct his attendance thereat<sup>3</sup>. The official receiver must give at least 14 days' notice<sup>4</sup> of the hearing:

- 460 (1) if a trustee has been nominated or appointed, to him;
- 461 (2) if a special manager has been appointed, to him; and
- 462 (3) subject to any contrary direction of the court, to every creditor of the bankrupt who is known to the official receiver or is identified in the bankrupt's statement of affairs<sup>5</sup>.

The official receiver may, if he thinks fit, cause notice of the order to be given, by public advertisement in one or more newspapers, at least 14 days before the day fixed for the hearing<sup>6</sup>.

<sup>1</sup> See para 293 ante. For the prescribed form of order see the Insolvency Rules 1986, SI 1986/1925, rr 6.172, 12.7(1), (2), Sch 4, Form 6.55 (substituted by SI 1987/1919).

<sup>2</sup> For the meaning of 'venue' see para 84 note 21 ante.

<sup>3</sup> Insolvency Rules 1986, SI 1986/1925, r 6.172(2). See also para 293 text to notes 1-3 ante.

<sup>4</sup> As to the mode of giving notice see *ibid* rr 13.3-13.5; and para 797 post.

<sup>5</sup> *Ibid* r 6.172(3).

<sup>6</sup> *Ibid* r 6.172(4).

**UPDATE****216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

**294 Notice of hearing**

TEXT AND NOTE 6--SI 1986/1925 r 6.172(4) substituted, r 6.172(5) added: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(ix) Public Examination/295. Persons entitled to participate in public examination.

### **295. Persons entitled to participate in public examination.**

The following may take part in the public examination of the bankrupt, and may question him concerning his affairs<sup>1</sup>, dealings and property<sup>2</sup> and the causes of his failure, namely:

- 463 (1) the official receiver and, where appropriate<sup>3</sup>, the Official Petitioner;
- 464 (2) the trustee of the bankrupt's estate<sup>4</sup>, if his appointment has taken effect;
- 465 (3) any person who has been appointed a special manager<sup>5</sup> of the bankrupt's estate or business;
- 466 (4) any creditor of the bankrupt who has tendered a proof in the bankruptcy<sup>6</sup>.

1 For the meaning of references to a person's affairs see para 81 note 4 ante.

2 For the meaning of 'property' see para 400 post.

3 Ie on a petition under the Insolvency Act 1986 s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 post. As to the Official Petitioner see para 845 post.

4 See para 316 et seq post.

5 See para 236 et seq ante.

6 Insolvency Act 1986 s 290(4). As to proofs of debt see para 490 et seq post. As to the modification of s 290 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1274.

### **UPDATE**

#### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(ix) Public Examination/296. Failure to attend public examination.

### **296. Failure to attend public examination.**

If a bankrupt without reasonable excuse fails at any time to attend his public examination<sup>1</sup>, he is guilty of a contempt of court and liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>2</sup>.

1 le under the Insolvency Act 1986 s 290: see para 291 et seq ante.

2 Ibid s 290(5). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq; and as to offences see para 707 et seq post. For the prescribed form of affidavit in support of an application for committal for contempt of court see the Insolvency Rules 1986, SI 1986/1925, rr 12.7(1), (2), Sch 4, Form 7.15 (substituted by SI 1991/495); and for the prescribed form of warrant of committal for contempt see the Insolvency Rules 1986, SI 1986/1925, Sch 4, Form 7.17.

As to the modification of the Insolvency Act 1986 s 290 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1274.

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **296 Failure to attend public examination**

NOTE 2--SI 1986/1925 Sch 4 Forms 7.15, 7.17 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(ix) Public Examination/297. Bankrupt unfit for examination.

### **297. Bankrupt unfit for examination.**

Where the bankrupt is suffering from any mental disorder or physical affliction or disability rendering him unfit to undergo or attend for public examination, the court may, on application in that behalf<sup>1</sup>, either stay the order for his public examination or direct that it is to be conducted in such manner and at such place as it thinks fit<sup>2</sup>. Such an application must be made by a person who has been appointed by a court in the United Kingdom or elsewhere to manage the affairs of, or to represent, the bankrupt, or by a relative or friend of the bankrupt whom the court considers to be a proper person to make the application, or by the official receiver<sup>3</sup>. Where the application is made by a person other than the official receiver, then:

- 467 (1) it must<sup>4</sup> be supported by the affidavit<sup>5</sup> of a registered medical practitioner as to the bankrupt's mental and physical condition;
- 468 (2) at least seven days' notice of the application must be given to the official receiver and the trustee, if any; and
- 469 (3) before any order is made on the application, the applicant must deposit with the official receiver such sum as the latter certifies to be necessary for the additional expenses of any examination that may be ordered on the application<sup>6</sup>.

An order made on the application may provide that the expenses of the examination are to be payable, as to a specified proportion, out of such a deposit, instead of out of the estate<sup>6</sup>. Where the application is made by the official receiver, it may be made without notice being served on any other party, and may be supported by evidence in the form of a report<sup>7</sup> by the official receiver to the court<sup>8</sup>.

1 As to the mode of application and the procedure see para 764 et seq post.

2 Insolvency Rules 1986, SI 1986/1925 r 6.174(1). For the prescribed form of order see rr 6.174, 12.7(1), (2), Sch 4, Form 6.57 (substituted by SI 1987/1919).

3 Insolvency Rules 1986, SI 1986/1925, r 6.174(2).

4 I.e. unless the bankrupt is a patient within the meaning of the Mental Health Act 1983: see MENTAL HEALTH vol 30(2) (Reissue) para 435.

5 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

6 Ibid r 6.174(3).

7 As to the use of reports see ibid r 7.9; and para 794 post.

8 Ibid r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 6.174(4).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### 297 Bankrupt unfit for examination

NOTE 2--SI 1986/1925 r 6.174(1) amended, Sch 4 Form 6.57 substituted: SI 2007/1898.

NOTE 6--SI 1986/1925 r 6.174(3) amended: SI 2007/1898.

NOTE 8--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

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#### 298. Procedure at hearing.

At the hearing<sup>1</sup> the bankrupt must be examined on oath; and he must answer all such questions as the court may put, or allow to be put, to him<sup>2</sup>. Any of the persons allowed<sup>3</sup> to question the bankrupt may, with the approval of the court (made known either at the hearing or in advance of it), appear by solicitor or counsel; or he may in writing authorise another person to question the bankrupt on his behalf<sup>4</sup>. The bankrupt may at his own expense employ a solicitor with or without counsel, who may put to him such questions as the court may allow for

the purpose of enabling him to explain or qualify any answers given by him, and may make representations on his behalf<sup>5</sup>.

There must be made in writing such record of the examination as the court thinks proper<sup>6</sup>; and the record must be read over either to or by the bankrupt, signed by him, and verified by affidavit<sup>7</sup> at a venue<sup>8</sup> fixed by the court<sup>9</sup>. The written record may in any proceedings<sup>10</sup> be used as evidence against the bankrupt of any statement made by him in the course of his public examination<sup>11</sup>. If criminal proceedings have been instituted against the bankrupt, and the court is of opinion that the continuance of the hearing would be calculated to prejudice a fair trial of those proceedings, the hearing may be adjourned<sup>12</sup>.

1 The public examination of debtors must be heard in open court: see *Practice Direction-Insolvency Proceedings* para 9.3(1); and para 764 note 2 head (a) post.

2 Insolvency Rules 1986, SI 1986/1925, r 6.175(1). As to the enforcement of court orders generally see para 725 post.

3 *Ie* under the Insolvency Act 1986 s 290(4): see para 295 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.175(2).

5 *Ibid* r 6.175(3).

6 As to shorthand writers see *ibid* rr 7.16-7.18 (as amended); and para 306 post.

7 As to the use of witness statements instead of affidavits in insolvency proceedings see *ibid* r 7.57(5), (6) (as substituted); and para 793 post.

8 For the meaning of 'venue' see para 84 note 21 ante.

9 Insolvency Rules 1986, SI 1986/1925, r 6.175(4). For the prescribed form of affidavit see rr 6.175, 12.7(1), (2), Sch 4, Form 6.58.

10 *Ie* whether under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

11 *Ibid* r 6.175(5).

12 *Ibid* r 6.175(6). As to adjournments see para 300 post.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 298 Procedure at hearing

NOTE 12--See *Re Rottmann (a bankrupt)* [2008] All ER (D) 266 (May) (order for private examination to avoid self-incrimination in foreign criminal proceedings) (affirmed [2009] EWCA Civ 473, [2010] 1 WLR 67).



## 299. Scope of public examination.

On his public examination a bankrupt cannot refuse to answer questions on the ground that his answers may tend to incriminate him, and his answers are admissible as evidence against him in other proceedings<sup>1</sup>. Before a question can be disallowed, the court must be satisfied that the answer could not secure any further assets or rights to the creditors or any protection to the public<sup>2</sup>, and accordingly the bankrupt may be compelled to disclose a secret process or formula<sup>3</sup>, or the source from which articles infringing a patent or trade mark have been bought<sup>4</sup>.

Where the bankrupt is called as a witness as to any matter arising in the bankruptcy, he may be questioned by any person, including the party who called him, as to what account he gave of the matter at his public or private examination<sup>5</sup>. The bankrupt's answers on his public examination may be used against him on an application<sup>6</sup> to strike a solicitor's name off the roll<sup>7</sup>, but not in proceedings brought against him in a representative capacity<sup>8</sup>.

The statements made by a bankrupt at his public examination are not admissible in evidence in proceedings even in the same bankruptcy as against other parties<sup>9</sup>, or the trustee in bankruptcy<sup>10</sup>.

1 *R v Scott* (1856) 25 LJMC 128; *R v Robinson* (1867) LR 1 CCR 80; *R v Widdop* (1872) LR 2 CCR 3; *Re Firth, ex p Schofield* (1877) 6 ChD 230, CA; *Re Atherton* [1912] 2 KB 251; *R v Dawson* [1960] 1 All ER 558, [1960] 1 WLR 163, CCA; *R v Harris* [1970] 3 All ER 746, [1970] 1 WLR 1252 (applying *R v Scott* supra, and examining the relevant authorities, including *R v Widdop* supra, and *R v Erdheim* [1896] 2 QB 260). See also *Bishopsgate Investment Management Ltd (in provisional liquidation) v Maxwell* [1993] Ch 1, [1992] 2 All ER 856, CA (company case where the privilege against self-incrimination was stated obiter to have been abrogated by the Insolvency Act 1986 s 133 (public examination of officers)). As to the privilege against self-incrimination see further para 308 post.

2 *Re Paget, ex p Official Receiver* [1927] 2 Ch 85, CA.

3 *Re Stevenson* [1918-1919] B & CR 106; *Re Keene* [1922] 2 Ch 475, CA.

4 *Re Jawett* [1929] 1 Ch 108.

5 *Re Cunningham, ex p Official Receiver v Cunningham* (1898) 6 Mans 199, CA; *Re Osborne, ex p Lovell* (1899) 43 Sol Jo 480; *Re A Debtor, Jacobs v Lloyd* [1944] Ch 344, [1944] 1 All ER 597 (bankrupt may be cross-examined thereon by the party who calls him). However, this does not make the bankrupt's answers on his examination admissible against other parties: see text and notes 9, 10 infra. As to private examinations in bankruptcy see para 307 et seq post.

6 See under the Solicitors Act 1974 s 47 (as amended): see LEGAL PROFESSIONS vol 66 (2009) PARA 907.

7 *Re A Solicitor* (1890) 25 QBD 17 (decided under the Solicitors Act 1888 s 13 (repealed)).

8 *New Prance and Garrard's Trustee v Hunting* [1897] 2 QB 19, CA; affd on other grounds sub nom *Sharp v Jackson* [1899] AC 419, HL.

9 *Re Brunner* (1887) 19 QBD 572; *New Prance and Garrard's Trustee v Hunting* [1897] 2 QB 19, CA; affd on other grounds sub nom *Sharp v Jackson* [1899] AC 419, HL.

10 *Re Bottomley, ex p Brougham* (1915) 84 LJKB 1020.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **300. Adjournment of public examination.**

The public examination may be adjourned by the court from time to time, either to a fixed date or generally<sup>1</sup>.

Where the examination has been adjourned generally, the court may at any time on the application<sup>2</sup> of the official receiver or of the bankrupt fix a venue<sup>3</sup> for the resumption of the examination<sup>4</sup>, and give directions as to the manner in which, and the time within which, notice of the resumed public examination is to be given to persons entitled to take part in it<sup>5</sup>.

Where such an application is made by the bankrupt, the court may grant it on terms that the expenses of giving the required notices be paid by him and that, before a venue for the resumed public examination is fixed, he must deposit with the official receiver such sum as the latter considers necessary to cover those expenses<sup>6</sup>. Where the examination is adjourned generally, the official receiver may, there and then, make application<sup>7</sup> for suspension of the bankrupt's automatic discharge from bankruptcy<sup>8</sup>. If, on the hearing of such an application, the court makes an order suspending the bankrupt's discharge, copies of such order must be sent by the court to the official receiver, the trustee and the bankrupt<sup>9</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.176(1). For the prescribed form of order see rr 6.176, 12.7(1), (2), Sch 4, Form 6.59 (substituted by SI 1987/1919).

2 As to the mode of application and the procedure see para 764 et seq post.

3 For the meaning of 'venue' see para 84 note 21 ante.

4 For the prescribed form of order see the Insolventcy Rules 1986, SI 1986/1925, rr 6.176, 12.7(1), (2), Sch 4, Form 6.60 (substituted by SI 1987/1919).

5 Insolventcy Rules 1986, SI 1986/1925, r 6.176(2).

6 Ibid r 6.176(3).

7 Ie under the Insolventcy Act 1986 s 279(3): see para 631 post.

8 Insolventcy Rules 1986, SI 1986/1925, r 6.176(4); and see *Re a Debtor (No 26 of 1991)* [1996] BCC 246, sub nom *Holmes v Official Receiver* [1996] BPIR 279 (where a public examination was adjourned and discharge suspended for a prescribed period).

9 Insolventcy Rules 1986, SI 1986/1925, r 6.176(5) (added by SI 1999/359).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **301. Order for production of documents by inland revenue official.**

On the application of the official receiver or the trustee of the bankrupt's estate, the court may<sup>1</sup> order an inland revenue official<sup>2</sup> to produce to the court:

- 470 (1) any return, account or accounts submitted, whether before or after the commencement of the bankruptcy<sup>3</sup>, by the bankrupt to any inland revenue official;
- 471 (2) any assessment or determination made, whether before or after the commencement of the bankruptcy, in relation to the bankrupt by any inland revenue official; or
- 472 (3) any correspondence, whether before or after the commencement of the bankruptcy, between the bankrupt and any inland revenue official<sup>4</sup>.

1   le for the purposes of an examination under the Insolvency Act 1986 s 290 (see para 291 et seq ante) or proceedings under ss 366-368 (see para 228 ante and para 307 et seq post). Section 369 does not, however, apply for the purposes of an examination under ss 366, 367 (see para 307 et seq post) which takes place by virtue of s 368 (see para 228 ante): s 369(7).

2   For these purposes, 'inland revenue official' means any inspector or collector of taxes appointed by the Commissioners of Inland Revenue or any person appointed by the Commissioners to serve in any other capacity: *ibid* s 369(6). As to the Commissioners of Inland Revenue see INCOME TAXATION.

3   As to the commencement of bankruptcy see para 213 ante.

4   Insolvency Act 1986 s 369(1). The court may not address an order under s 369(1) to an inland revenue official unless it is satisfied that that official is dealing, or has dealt, with the affairs of the bankrupt: s 369(3). As to the application for such an order see para 302 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 369 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

As to the public interest immunity of tax documents see *Lonrho plc v Fayed (No 4)* [1994] QB 775, [1994] 1 All ER 870 at 882, CA.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **302. Application for order.**

An application by the official receiver or the trustee for an order to the inland revenue to produce documents<sup>1</sup> must specify, with such particularity as will enable the order, if made, to be most easily complied with, the documents whose production to the court is desired, naming the official to whom the order is to be addressed<sup>2</sup>.

The court must fix a venue<sup>3</sup> for the hearing of the application<sup>4</sup>; and notice of the venue, accompanied by a copy of the application, must be sent by the applicant to the Commissioners of Inland Revenue<sup>5</sup> at least 28 days before the hearing<sup>6</sup>. The notice must require the Commissioners, not later than seven days before the date fixed for the hearing of the application, to inform the court whether they consent or object to the making of an order under these provisions<sup>7</sup>. If the Commissioners consent to the making of an order, they must inform the court of the name of the official to whom it should be addressed, if other than the one named in the application<sup>8</sup>; and, if the Commissioners object to the making of an order, they must secure that an officer of theirs attends the hearing of the application and, not less than seven days before it, deliver to the court a statement in writing of the grounds of their objection<sup>9</sup>. A copy of the statement must be sent forthwith to the applicant<sup>9</sup>.

1    le under the Insolvency Act 1986 s 369: see para 301 ante.

2    Insolvency Rules 1986, SI 1986/1925, r 6.194(1).

3    For the meaning of 'venue' see para 84 note 21 ante.

4    Insolvency Rules 1986, SI 1986/1925, r 6.194(2).

5    As to the Commissioners of Inland Revenue see INCOME TAXATION.

6    Insolvency Rules 1986, SI 1986/1925, r 6.194(3).

7    Ibid r 6.194(4).

8    Ibid r 6.194(5).

9    Ibid r 6.194(6).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/(ix) Public Examination/303. Making and service of order.

### **303. Making and service of order.**

If, on the hearing of the application<sup>1</sup>, it appears to the court to be a proper case, the court may make the order applied for, with such modifications, if any, as appear appropriate having regard to any representations made on behalf of the Commissioners of Inland Revenue<sup>2</sup>.

The order:

- 473 (1) may be addressed to an inland revenue official other than the one named in the application;
- 474 (2) must specify a time, not less than 28 days after service on the official to whom the order is addressed, within which compliance is required; and
- 475 (3) may include requirements as to the manner in which documents to which the order relates are to be produced<sup>3</sup>.

A sealed copy of the order must be served by the applicant on the official to whom it is addressed<sup>4</sup>.

If the official is unable to comply with the order because he has not the relevant documents in his possession, and has been unable to obtain possession of them, he must deliver to the court a statement in writing as to the reasons for his non-compliance; and a copy of the statement must be sent forthwith by the official to the applicant<sup>5</sup>.

Where the court has made such an order for the purposes of any examination or proceedings, the court may, at any time after the document to which the order relates is produced to it, by order authorise the disclosure of the document, or of any part of its contents, to the official receiver, the trustee of the bankrupt's estate or the bankrupt's creditors<sup>6</sup>.

1 le under the Insolvency Act 1986 s 369: see paras 301, 302 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.195(1). For the prescribed form of order see rr 6.195, 12.7(1), (2), Sch 4, Form 6.69. As to the Commissioners of Inland Revenue see INCOME TAXATION.

3 Ibid r 6.195(2).

4 Ibid r 6.195(3).

5 Ibid r 6.195(4).

6 Insolvency Act 1986 s 369(2). As to the application of s 369 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 301 note 4 ante. For the prescribed form of order see the Insolvency Rules 1986, SI 1986/1925, rr 6.195, 12.7(1), (2), Sch 4, Form 6.70.

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **304. Disclosure and custody of documents.**

Where any document to which an order to the inland revenue to produce documents<sup>1</sup> relates is not in the possession of the inland revenue official<sup>2</sup> to whom the order is addressed, it is the duty of that official to take all reasonable steps to secure possession of it, and, if he fails to do so, to report the reasons for his failure to the court<sup>3</sup>; and, where any document to which such an order relates is in the possession of an inland revenue official other than the one to whom the order is addressed, it is the duty of the official in possession of the document, at the request of the official to whom the order is addressed, to deliver it to the official making the request<sup>4</sup>. Where, in compliance with an order to the inland revenue to produce documents<sup>5</sup>, original documents are produced, and not copies, any person who, by order of the court<sup>6</sup>, has them in his possession or custody is responsible to the court for their safe keeping and return as and when directed<sup>7</sup>.

1    Ie an order under the Insolvency Act 1986 s 369(1): see para 301 et seq ante.

2    For the meaning of 'inland revenue official' see para 301 note 2 ante.

3    Insolvency Act 1986 s 369(4). As to the application of s 369 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 301 note 4 ante.

4    Ibid s 369(5).

5    Ie under ibid s 369: see para 301 et seq ante.

6    Ie under ibid s 369(2): see para 303 ante.

7    Insolvency Rules 1986, SI 1986/1925, r 6.196.

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **305. Expenses of examination.**

Where a public examination of the bankrupt has been ordered by the court on a creditors' requisition<sup>1</sup>, the court may order that the expenses of the examination are to be paid, as to a specified proportion, out of the deposit paid by the requisitionists<sup>2</sup>, instead of out of the estate<sup>3</sup>. In no case do the costs and expenses of a public examination fall on the official receiver personally<sup>4</sup>.

1    Ie under the Insolvency Rules 1986, SI 1986/1925, r 6.173: see para 292 ante.

2    Ie under ibid r 6.173(2): see para 292 ante.

3    Ibid r 6.177(1).

4 Ibid r 6.177(2).

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **306. Nomination and appointment of shorthand writers.**

In the High Court the judge and, in a county court, the district judge, may in writing nominate one or more persons to be official shorthand writers to the court<sup>1</sup>. The court may, at any time in the course of insolvency proceedings<sup>2</sup>, appoint a shorthand writer to take down the evidence of a person examined<sup>3</sup>. Where the official receiver applies to the court for an order appointing a shorthand writer, he must name the person he proposes for appointment; and that appointment must be made, unless the court otherwise orders<sup>4</sup>.

The remuneration of a shorthand writer appointed in insolvency proceedings must be paid by the party at whose instance the appointment was made, or out of the bankrupt's estate, or otherwise, as the court may direct<sup>5</sup>.

Where in insolvency proceedings the court appoints a shorthand writer on the application of the official receiver, in order that a written record may be taken of the evidence of a person to be examined, the cost of the written record is deemed an expense of the official receiver in the proceedings<sup>6</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 7.16(1); Courts and Legal Services Act 1990 s 74(1)(a). For the prescribed form of declaration to be given by the official shorthand writer see the Insolvency Rules 1986, SI 1986/1925, rr 7.16, 12.7(1), (2), Sch 4, Form 7.3. See also para 795 post.

2 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 7.16(2). Such examination takes place under the Insolvency Act 1986 s 290 (see para 291 et seq ante) or s 366 (see para 307 et seq post): Insolvency Rules 1986, SI 1986/1925, r 7.16(2). For the prescribed form of appointment see rr 7.16, 12.7(1), (2), Sch 4, Form 7.4; and for the prescribed form of declaration by the shorthand writer see Sch 4, Form 7.5.

4 Ibid r 7.16(3).

5 Ibid r 7.17(1). Any question arising as to the rates of remuneration payable must be determined by the court in its discretion: r 7.17(2) (substituted by SI 1993/602).

6 Insolvency Rules 1986, SI 1986/1925, r 7.18.

## UPDATE

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **306 Nomination and appointment of shorthand writers**

NOTE 3--SI 1986/1925 r 7.16(2) amended: SI 2009/642.

TEXT AND NOTE 6--SI 1986/1925 r 7.18 revoked: SI 2010/686.

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### **(x) Private Examination**

#### **307. Inquiry into bankrupt's dealings and property.**

At any time after a bankruptcy order has been made<sup>1</sup> the court may, on the application of the official receiver or the trustee of the bankrupt's estate<sup>2</sup>, summon to appear before it:

- 476 (1) the bankrupt or the bankrupt's spouse or former spouse;
- 477 (2) any person known or believed to have any property comprised in the bankrupt's estate in his possession or to be indebted to the bankrupt;
- 478 (3) any person appearing to the court to be able to give information concerning the bankrupt or the bankrupt's dealings, affairs<sup>3</sup> or property<sup>4</sup>.

The court may require any such person as is mentioned in heads (2) and (3) above to submit an affidavit<sup>5</sup> to the court containing an account of his dealings with the bankrupt or to produce any documents in his possession or under his control relating to the bankrupt or the bankrupt's dealings, affairs or property<sup>6</sup>. Any person who appears or is brought before the court<sup>7</sup> may be examined on oath, either orally or by clarifying any matter or by giving further information, concerning the bankrupt or the bankrupt's dealings, affairs and property<sup>8</sup>.

The purpose of a private examination is to assist the official receiver, the trustee or the interim receiver, as the case may be, who comes to the affairs of the bankrupt as a stranger, to investigate and to understand transactions done by, with or on behalf of the bankrupt or his business associates, many of which may be unrecorded or obscure<sup>9</sup>. The examination is not itself a litigious proceeding, but is to enable the trustee to inform himself, with as little expense and as much ease as possible<sup>10</sup>, as to what course he should pursue in some matter or claim relating to the bankrupt's estate, which he is allowed to state privately<sup>11</sup> to the court, and to assess his chances of success in proceedings relating to it<sup>12</sup>.

1 As to bankruptcy orders see para 195 et seq ante.

2 For the meaning of 'the bankrupt's estate' see para 216 ante.

3 For the meaning of references to a person's affairs see para 81 note 4 ante.

4 Insolvency Act 1986 s 366(1). For the meaning of 'property' see para 400 post. The Insolvency Rules 1986, SI 1986/1925, Pt 9 (rr 9.1-9.6 (as amended): see para 309 et seq post) relates to applications to the court for an order under the Insolvency Act 1986 s 366: Insolvency Rules 1986, SI 1986/1925, r 9.1(1)(b).



In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 366 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

The Insolvency Act 1986 s 366 applies where an interim receiver has been appointed under s 286 (see para 222 et seq ante) as it applies where a bankruptcy order has been made, as if: (1) references to the official receiver or the trustee were to the interim receiver; and (2) references to the bankrupt and to his estate were, respectively, to the debtor and his property: s 368. As to the application of s 368 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 228 note 5 ante.

5 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

6 Insolvency Act 1986 s 366(1).

7 *Ie* under *ibid* ss 366 or 367.

8 *Ibid* s 367(4). Section 367 applies where an interim receiver has been appointed under s 286 (see para 222 et seq ante) as it applies where a bankruptcy order has been made, as if: (1) references to the official receiver or trustee were to the interim receiver; and (2) references to the bankrupt and to his estate were, respectively, to the debtor and his property: s 368.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 367 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 30.

9 Cf the Insolvency Act 1986 ss 236, 237 (inquiry into company's dealings etc; court's enforcement powers): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 679 et seq. See also *Re Overend, Gurney & Co, ex p Musgrave* (1867) 16 LT 378; *Re Gold Co* (1879) 12 ChD 77 at 84, CA; *Re Greys Brewery Co* (1883) 25 ChD 400; *Re North Australian Territory Co* (1890) 45 ChD 87 at 93, CA; *Re A Debtor (No 472 of 1950)* [1958] 1 All ER 581, [1958] 1 WLR 283, CA; *Re A Debtor (No 12 of 1958), ex p Trustee of Property of Debtor v Clegg* [1968] 2 All ER 425, [1968] 1 WLR 788, DC; *Re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 591, 592, [1969] 2 All ER 1386 at 1396; *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] Ch 90, [1991] 1 All ER 894, CA; *British & Commonwealth Holdings plc (Joint Administrators) v Spicer and Oppenheim (a firm)* [1993] AC 426, [1992] 4 All ER 876, HL.

10 *Re Rolls Razor Ltd* [1968] 3 All ER 698 at 700.

11 See the Insolvency Rules 1986, SI 1986/1925, r 9.5(3); and para 312 post. See also *Re Murjani (a bankrupt)* [1996] 1 All ER 65, [1996] 1 WLR 1498.

12 *Learoyd v Halifax Joint Stock Banking Co* [1893] 1 Ch 686 at 692, 693.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 307 Inquiry into bankrupt's dealings and property

TEXT AND NOTE 4--1986 Act 366(1) amended: Civil Partnership Act 2004 Sch 27 para 120.

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### 308. Restrictions on exercise of power to order examination.

Despite the considerations referred to above<sup>1</sup>, the power to order a private examination is one which ought to be carefully exercised<sup>2</sup>; the court must be astute to prevent any oppressive, vexatious or unfair use of the power<sup>3</sup>. Factors which may be taken into account by the court in exercising its discretion include the following:

- 479 (1) whether the order is sought against those under a duty to co-operate with the office-holder;
- 480 (2) the views of the office-holder are to be given great weight;
- 481 (3) the office-holder is entitled not only to general information but to specific information concerning possible claims against specific persons;
- 482 (4) the mere fact that an office-holder has commenced or is about to commence proceedings against the respondent is not an absolute bar to the making of an order;
- 483 (5) the risk that a respondent might expose himself to liability is merely a factor to be taken into account, the risk of exposure to a fraud claim not being conclusive;
- 484 (6) the fact that a respondent may have to answer questions which expose him to criminal liability is not decisive;
- 485 (7) an oral examination is likely to be more oppressive than an order for production of documents<sup>4</sup>.

<sup>1</sup> See para 307 ante.

<sup>2</sup> See the leading cases decided under the similar provision relating to corporate insolvency in the Insolvency Act 1986 s 236: *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] Ch 90, [1991] 1 All ER 894, CA; *British & Commonwealth Holdings plc (Joint Administrators) v Spicer and Oppenheim (a firm)* [1993] AC 426, [1992] 4 All ER 876, HL; *Re Bishopsgate Investment Management Ltd* [1993] Ch 1, [1992] 2 All ER 856, CA. For older cases see *Re Wright, ex p Willey* (1883) 23 ChD 118 at 128, CA; *Re Gregory, ex p Norton* [1935] Ch 65, CA; *Re A Debtor (No 472 of 1950)* [1958] 1 All ER 581, [1958] 1 WLR 283, CA; *Re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 592, [1969] 3 All ER 1386 at 1397. Cf the Insolvency Act 1986 ss 236, 237 (inquiry into company's dealings etc; court's enforcement powers): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 679 et seq.

<sup>3</sup> *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] Ch 90, [1991] 1 All ER 894, CA (the court must balance the liquidator's requirements against any risk of possible oppression to the proposed witness; ordering pre-trial depositions from parties suspected of fraud or dishonest behaviour may be oppressive); *British & Commonwealth Holdings plc (Joint Administrators) v Spicer and Oppenheim (a firm)* [1993] AC 426, [1992] 4 All ER 876, HL (court must bear in mind the public interest and the interests of those affected by the insolvency; oppression arising out of the expense to which a witness might be put can be compensated for by an order for costs).

There may be cases where the court may think it appropriate that no examination should be ordered until written questions have been submitted by the trustee to the person sought to be examined; but the unsworn answers to those questions may often prove no adequate substitute for an oral examination before the court: *Re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 596, [1969] 3 All ER 1386 at 1400. There is no invariable requirement that a private examination should be preceded by written questions; it is a matter for the unfettered discretion of the court which has to determine how best the examination may be carried out balancing the views of the liquidator, which are entitled to be given great weight, against the requirement that the investigation should not be carried out in an oppressive or unfair manner to the persons being examined: *Re Norton Warburg Holdings Ltd* [1983] BCLC 235 (company case). There is an express power in the court to order examination on oath in order to clarify any matter or give further information: see the Insolvency Act 1986 s 367(4); and para 307 ante.

As to the question of documents protected by legal professional privilege see *Re Murjani (a bankrupt)* [1996] 1 All ER 65, [1996] 1 WLR 1498; *Re Ouvaroff (a bankrupt)* [1997] BPIR 712. For company cases see also *Barclays Bank plc v Eustice* [1995] 4 All ER 511, [1995] 1 WLR 1238, CA; *Royscot Spa Leasing Ltd v Lovett* [1995] BCC 502, CA; *Dubai Bank Ltd v Galadari* [1990] Ch 98, [1989] 3 All ER 769, CA; and *Re Highgrade Traders Ltd* [1984] BCLC 151, CA.

As to the case of a solicitor witness see *Re A Debtor (No 472 of 1950)* [1958] 1 All ER 581, sub nom *Re A Debtor (No 472 of 1950), ex p Swirsky* [1958] 1 WLR 283, CA; *International Credit and Investment Co (Overseas) Ltd v Adham* [1997] 9 LS Gaz R 31 (power of the court to order a solicitor to disclose name and address of client should only be exercised in exceptional circumstances); and *The Guide to the Professional Conduct of Solicitors* (8th Edn, 1999) para 16.03.

See also *Morris v Director of Serious Fraud Office* [1993] Ch 372, [1993] 1 All ER 788, CA (an order for the production of documents belonging to third parties and obtained by the Serious Fraud Office should not be made without hearing the third parties as owners of the documents); *Re Murjani (a bankrupt)* supra at 78, 1511, 1512 (where exceptions to this practice are described).

The privilege against self-incrimination does not apply to bankruptcy examinations where the examinee is under a duty to co-operate with the office-holder: see *R v Kansal* [1993] QB 244, [1992] 3 All ER 844, CA. See also *Bishopsgate Investment Management Ltd (in provisional liquidation) v Maxwell* [1993] Ch 1, [1992] 2 All ER 856, CA; *Re London United Investments plc* [1992] Ch 578, [1992] 2 All ER 842, CA; *Bank of England v Riley* [1992] Ch 475, [1992] 1 All ER 769, CA; *Re Jeffrey S Levitt Ltd (in administrative receivership)* [1992] Ch 457, [1992] 2 All ER 509. As to the subsequent use in criminal proceedings of evidence obtained under compulsory powers see Case 43/1994/490/572 *Saunders v United Kingdom* (1997) 2 BHRC 358, ECtHR; *A-G's Reference (No 7 of 2000)* [2001] EWCA Crim 888, [2001] 1 WLR 1879. Cf the Insolvency Act 1986 ss 133, 236 et seq; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 538 et seq; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 679-685.

As to confidential documents see *Pharaon v Bank of Credit and Commerce International SA (in liquidation) (Price Waterhouse (a firm) intervening), Price Waterhouse v Bank of Credit and Commerce International SA (in liquidation)* [1998] 4 All ER 455 (the need for disclosure will in general prevail over a claim to preserve confidentiality); *Joint Liquidators of Sasea Finance Ltd v KPMG* [1998] BCC 216; *Re Murjani (a bankrupt)* [1996] 1 All ER 65, [1996] 1 WLR 1498; *British & Commonwealth Holdings plc (Joint Administrators) v Spicer and Oppenheim (a firm)* [1993] AC 426, [1992] 4 All ER 876, HL (an order for the production of documents is not necessarily unreasonable on the grounds that it is inconvenient or causes extra work or expense); *Re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208, [1991] 4 All ER 385. The court also has jurisdiction to order production of documents regardless of where they are located: *Re Mid-East Trading Ltd, Lehman Bros Inc v Phillips* [1998] 1 All ER 577, [1998] 1 BCLC 240, CA (a case under the Insolvency Act 1986 s 236).

4 *British & Commonwealth Holdings plc (Joint Administrators) v Spicer and Oppenheim (a firm)* [1993] AC 426, [1992] 4 All ER 876, HL.

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 308 Restrictions on exercise of power to order examination

NOTE 3--*Guide to the Professional Conduct of Solicitors* (8th Edn, 1999) replaced, with effect from 1 July 2007, by the *Solicitors' Code of Conduct 2007*.

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### 309. Obtaining order for examination.

The application<sup>1</sup> must be in writing, and must be accompanied by a brief statement of the grounds on which it is made<sup>2</sup>. The respondent<sup>3</sup> must be sufficiently identified in the application<sup>4</sup>. There must be stated in the application whether it is an application for the respondent:

- 486 (1) to be ordered to appear before the court; or  
 487 (2) to be ordered to clarify any matter which is in dispute in the proceedings or  
 to give additional information in relation to any such matter and, if so, the normal  
 rules relating to further information<sup>5</sup> apply to any such order; or  
 488 (3) to submit affidavits<sup>6</sup> (if so, particulars to be given of the matters to which he  
 is required to swear); or  
 489 (4) to produce books, papers or other records (if so, the items in question to be  
 specified),

or for any two or more of those purposes<sup>7</sup>.

The application may be made without notice being served on any other party<sup>8</sup>.

1    Ie an application for an order under the Insolvency Act 1986 s 366: see para 307 ante. For the prescribed form of order see the Insolvency Rules 1986, SI 1986/1925, rr 9.1, 12.7(1), (2), Sch 4, Form 9.1.

2    Ibid r 9.2(1). The statement is prima facie confidential by reason of r 9.5(3) (see para 312 post) and is not open to inspection by the respondent without the permission of the court. As to the position where inspection is sought by a respondent seeking to set aside an order made under the Insolvency Act 1986 s 366 see *Re British & Commonwealth Holdings plc (Nos 1 & 2)* [1992] Ch 342, [1992] 2 All ER 801, CA; affd sub nom *British & Commonwealth Holdings plc (Joint Administrators) v Spicer and Oppenheim (a firm)* [1993] AC 426, [1992] 4 All ER 876, HL (decided under the Insolvency Act s 236); *Re Murjani (a bankrupt)* [1996] 1 All ER 65, [1996] 1 WLR 1498. The proper course for an office-holder making an application is for him to put sensitive information in an annexure: *Re British & Commonwealth Holdings plc (Nos 1 & 2)* supra; *Re Murjani (a bankrupt)* supra.

3    For these purposes, 'the respondent' means the person in respect of whom an order is applied for: Insolvency Rules 1986, SI 1986/1925, r 9.1(2)(a). As to who may apply for an order see *Re Adlards Motor Group Holdings Ltd* [1990] BCLC 68 (the fact that the liquidator's application for examination is financed by a creditor will not in itself be a ground for refusing to make an order).

4    Insolvency Rules 1986, SI 1986/1925, r 9.2(2).

5    Ie CPR Pt 18: see CIVIL PROCEDURE vol 11 (2009) PARAS 611, 612.

6    A witness statement may not be used: see the Insolvency Rules 1986, SI 1986/1925, r 7.57(6) (as substituted); and para 793 post.

7    Ibid r 9.2(3) (amended by SI 1999/1022).

8    Insolvency Rules 1986, SI 1986/1925, r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 9.2(4). As to the mode of application and the procedure see para 764 et seq post. In general, an application should be made with notice, but, where necessary, it may be made without notice being served on any other party: *Re Murjani (a bankrupt)* [1996] 1 All ER 65, [1996] 1 WLR 1498; *Re PFTZM (in liquidation)*, *Jourdain v Paul* [1995] 2 BCLC 354, [1995] BCC 280. If the application is made without notice being served on any other party, there is a duty to place all material facts before the court: *Re John T Rhodes Ltd (No 2)* (1987) 3 BCC 588 (company case).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 309 Obtaining order for examination

NOTE 1--SI 1986/1925 r 9.1 amended: SI 2009/642. SI 1986/1925 Sch 4 Form 9.1 amended: SI 2009/2472.

NOTE 8--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

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### 310. Order for examination.

The court may, whatever the purpose of the application, make any order which it has power<sup>1</sup> to make<sup>2</sup>. If the court orders the respondent<sup>3</sup> to appear before it, it must specify a venue<sup>4</sup> for his appearance, which must be not less than 14 days from the date of the order<sup>5</sup>. The court may, if it thinks fit, order that any person who, if within the jurisdiction of the court, would be liable to be summoned to appear before it<sup>6</sup> be examined in any part of the United Kingdom where he may be for the time being, or in any place outside the United Kingdom<sup>7</sup>. If the respondent is ordered to submit affidavits<sup>8</sup>, the order must specify the matters which are to be dealt with in his affidavits, and the time within which they are to be submitted to the court<sup>9</sup>. If the order is to produce books, papers or other records, the time and manner of compliance must be specified<sup>10</sup>.

The order must be served forthwith on the respondent; and it must be served personally, unless the court otherwise orders<sup>11</sup>.

1 le under the Insolvency Act 1986 s 366: see para 307 ante.

2 Insolvency Rules 1986, SI 1986/1925, rr 9.1(2)(b), 9.3(1). For the prescribed form of order see para 309 note 1 ante.

3 For the meaning of 'the respondent' see para 309 note 3 ante.

4 For the meaning of 'venue' see para 84 note 21 ante.

5 Insolvency Rules 1986, SI 1986/1925, r 9.3(2).

6 See note 1 supra.

7 Insolvency Act 1986 s 367(3). As to the application of s 367: (1) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition; or (2) where an interim receiver has been appointed, see para 307 note 8 ante. An injunction may be obtained to restrain a person from leaving the jurisdiction pending the examination: *Morris v Murjani* [1996] 2 All ER 384, [1996] 1 WLR 848, CA, applying *Re Oriental Credit Ltd* [1988] Ch 204, [1988] 1 All ER 892.

The Insolvency Act 1986 s 367(3) re-enacts the power conferred by the Bankruptcy Act 1914 s 25(6) (repealed) which permitted an examination to take place outside the United Kingdom. In *Re Drucker, ex p Basden (No 2)* [1902] 2 KB 210, Wright J held that a similar power under the Bankruptcy Act 1883 s 27 (repealed) did not apply outside the jurisdiction of the Crown. 'It is impossible to suppose that the legislature intended to empower the court to order the examination of persons in foreign countries': *Re Drucker, ex p Basden (No 2)* supra at 211. Whether or not such a supposition may still be made, there remains the practical problem of enforcement.

In *Re Tucker (a bankrupt), ex p Tucker* [1990] Ch 148, [1988] 1 All ER 603, CA, a summons was issued under the Bankruptcy Act 1914 s 25(1) (repealed) requiring the bankrupt's brother to attend for examination in the High Court, the summons being served in Belgium where the bankrupt's brother was resident. The brother applied to have the order for service on him in Belgium set aside, although no application was made to have the summons itself set aside. The application was dismissed: see [1987] 2 All ER 23, [1987] 1 WLR 928. The brother appealed, and on the appeal the trustee sought an order for the brother's examination in Belgium. The Court of Appeal allowed the appeal and dismissed the trustee's application. Under the Bankruptcy Act 1914 s 25(1) (repealed) the court was empowered to issue summonses against persons resident in England only. However, under s 25(6) (repealed) the court had a discretion to make an order for the examination of a person before a court in a foreign country. Any person might be the subject of such an order which need not have been limited to persons who were British subjects. Before such an order could be made, however, the court had to be

satisfied that there was proper machinery available to ensure compliance. Under the relevant United Kingdom/Belgian Convention an examination might be held in Belgium but not under any compulsion, and any summons served on the bankrupt's brother would have to state expressly that there was no compulsion for him to appear. The brother had shown himself unwilling to co-operate. In the circumstances the Court of Appeal considered that no useful purpose would be achieved by making an order for the examination of the brother before the Belgian court and, in the exercise of its discretion, refused the order sought.

As to the effect of the Insolvency Act 1986 s 426 (as amended) on an examination directed to be conducted abroad see para 728 post.

8 A witness statement may not be used: see the Insolvency Rules 1986, SI 1986/1925, r 7.57(6) (as substituted); and para 793 post.

9 Ibid r 9.3(3).

10 Ibid r 9.3(4).

11 Ibid r 9.3(5).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### 311. Procedure at examination.

At any examination of the respondent<sup>1</sup>, the applicant may attend in person, or be represented by a solicitor with or without counsel, and may put such questions to the respondent as the court may allow<sup>2</sup>. Any other person who could have applied for an order<sup>3</sup> in respect of the bankrupt's affairs may, with the permission of the court and if the applicant does not object, attend the examination and put questions to the respondent, but only through the applicant<sup>4</sup>. If the respondent is ordered to clarify any matter or to give additional information, the court must direct him as to the questions which he is required to answer, and as to whether his answers, if any, are to be made on affidavit<sup>5</sup>.

Where the application has been made on information provided by a creditor of the bankrupt, that creditor may, with the permission of the court and if the applicant does not object, attend the examination and put questions to the respondent, but only through the applicant<sup>6</sup>. The respondent may at his own expense employ a solicitor with or without counsel, who may put to him such questions as the court may allow for the purposes of enabling him to explain or qualify any answers given by him, and may make representations on his behalf<sup>7</sup>.

1 For the meaning of 'the respondent' see para 309 note 3 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 9.4(1); and see *Re Richbell Strategic Holdings Ltd (in liquidation) (No 2)* [2000] 2 BCLC 794 (a person may not refuse to answer a question on the basis that the examiner already knows the answer; a person must answer questions to the best of his ability, even if he does not have access to relevant documents). As to the privilege against self-incrimination see para 308 ante.

3 le under the Insolvency Act 1986 s 366: see para 307 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 9.4(2).

5 Ibid r 9.4(3) (substituted by SI 1999/1022). A witness statement may not be used: see the Insolvency Rules 1986, SI 1986/1925, r 7.57(6) (as substituted); and para 793 post.

6 Ibid r 9.4(4). Other creditors who may not attend the examination may put to the bankrupt at creditors' meetings such questions as the chairman may in his discretion allow: see r 6.84(6); and para 273 ante.

7 Ibid r 9.4(5).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **311 Procedure at examination**

NOTE 6--SI 1986/1925 r 9.4(4) amended: SI 2009/642.

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#### **312. Record of examination.**

There must be made in writing such record of the examination as the court thinks proper; and the record must be read over either to or by the respondent<sup>1</sup> and signed by him at a venue<sup>2</sup> fixed by the court<sup>3</sup>. The written record may in any proceedings<sup>4</sup> be used as evidence against the respondent of any statement made by him in the course of his examination<sup>5</sup>.

Unless the court otherwise directs, the written record of the respondent's examination, and any answer given by him in order to clarify any matter or give further information, and any affidavits<sup>6</sup> submitted by him in compliance with an order of the court<sup>7</sup> must not be filed in court<sup>8</sup>. The written record, answers and affidavits must not be open to inspection, without an order of the court, by any person other than the applicant for an order, or any person who could have applied for such an order in respect of the affairs of the same bankrupt<sup>9</sup>; and this applies to so much of the court file as shows the grounds of the application for an order and to any copy of a proposed request to clarify any matter or give further information<sup>10</sup>. The court may from time to time give directions as to the custody and inspection of any such documents and as to the furnishing of copies of, or extracts from, such documents<sup>11</sup>.

1 For the meaning of 'the respondent' see para 309 note 3 ante.

2 For the meaning of 'venue' see para 84 note 21 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 9.4(6). As to the appointment of shorthand writers see para 306 ante.

4 le whether under the Insolvency Act 1986 or otherwise.

- 5 Insolvency Rules 1986, SI 1986/1925, r 9.4(7). See further para 308 note 3 ante.
- 6 A witness statement may not be used: see *ibid* r 7.57(6) (as substituted); and para 793 post.
- 7 *le* under the Insolvency Act 1986 s 366: see paras 307, 310 ante.
- 8 Insolvency Rules 1986, SI 1986/1925, r 9.5(1). For the meaning of 'file in court' see para 95 note 10 ante.
- 9 *Ibid* r 9.5(2). As to the persons who may apply for such an order see para 307 ante. The transcript of an examination may be protected by legal privilege and also by order of the court: *Hamilton v Naviede* [1995] 2 AC 75, sub nom *Re Arrows Ltd (No 4)*, *Hamilton v Naviede* [1994] 3 All ER 814, HL, applying *Rank Film Distributors Ltd v Video Information Centre (a firm)* [1982] AC 380, [1981] 2 All ER 76, HL; *AT & T Istel Ltd v Tully* [1993] AC 45, [1992] 3 All ER 523, HL.
- 10 Insolvency Rules 1986, SI 1986/1925, r 9.5(3); and see *Re British & Commonwealth Holdings plc (Nos 1 & 2)* [1992] Ch 342, [1992] 2 All ER 801, CA; *affd* sub nom *British & Commonwealth Holdings plc (Joint Administrators) v Spicer and Oppenheim (a firm)* [1993] AC 426, [1992] 4 All ER 876, HL (court has a discretion whether or not to order disclosure to a third party of the statement of grounds). See also *Re Murjani (a bankrupt)* [1996] 1 All ER 65, [1996] 1 WLR 1498; *First Tokyo Index Trust v Gould* [1996] BPIR 406, Ct of Sess.
- 11 Insolvency Rules 1986, SI 1986/1925, r 9.5(4).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/ (x) Private Examination/313. Failure to appear.

### 313. Failure to appear.

Where a person without reasonable excuse fails to appear before the court when he is summoned to do so<sup>1</sup> or there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court, the court may, for the purpose of bringing that person and anything in his possession before the court, cause a warrant to be issued to a constable or prescribed officer of the court<sup>2</sup> for the arrest of that person, and for the seizure of any books, papers, records<sup>3</sup>, money or goods in that person's possession<sup>4</sup>. The court may also authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held<sup>5</sup> until that person is brought before the court under the warrant or until such other time as the court may order<sup>6</sup>.

When a person is arrested under such a warrant, the officer arresting him must forthwith bring him before the court issuing the warrant in order that he may be examined<sup>7</sup>. If he cannot immediately be brought up for examination, the officer must deliver him into the custody of the governor of the prison named in the warrant, who must keep him in custody and produce him before the court as it may from time to time direct<sup>8</sup>. After arresting the person named in the warrant, the officer must forthwith report to the court the arrest or delivery into custody, as the case may be, and apply to the court to fix a venue<sup>9</sup> for the person's examination<sup>10</sup>. The court must appoint the earliest practicable time for the examination, and must direct the governor of



the prison to produce the person for examination at the time and place appointed, and forthwith give notice of the venue to the person who applied for the warrant<sup>11</sup>.

Any property in the arrested person's possession which may be seized must, as may be directed by the court, be lodged with, or otherwise dealt with as instructed by, whoever is specified in the warrant as authorised to receive it, or kept by the officer seizing it pending the receipt of written orders from the court as to its disposal<sup>12</sup>.

1 le under the Insolvency Act 1986 s 366(1): see para 307 ante.

2 The prescribed officers of the court are, in the case of the High Court, the tipstaff and his assistants of the court, and, in the case of a county court, the district judge and the bailiffs: Insolvency Rules 1986, SI 1986/1925, r 7.21(2); Courts and Legal Services Act 1990 s 74(1)(a).

3 For the meaning of 'records' see para 21 note 11 ante.

4 Insolvency Act 1986 s 366(2), (3). As to the application of s 366 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 307 note 4 ante.

5 le in accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended): see infra.

6 Insolvency Act 1986 s 366(4).

7 Insolvency Rules 1986, SI 1986/1925, r 7.23(1). For the prescribed form of warrant see rr 7.23, 12.7(1), (2), Sch 4, Form 7.8.

8 Ibid r 7.23(2). For the prescribed form of order for production of the person arrested under such a warrant see rr 7.23, 12.7(1), (2), Sch 4, Form 7.9 (substituted by SI 1987/1919).

9 For the meaning of 'venue' see para 84 note 21 ante.

10 Insolvency Rules 1986, SI 1986/1925, r 7.23(3).

11 Ibid r 7.23(4). For the prescribed form of order for the production of a person arrested see rr 7.23, 12.7(1), (2), Sch 4, Form 7.9 (substituted by SI 1987/1919).

12 Insolvency Rules 1986, SI 1986/1925, r 7.23(5).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 313 Failure to appear

NOTE 7--SI 1986/1925 r 7.23(1) amended: SI 2009/642. SI 1986/1925 Sch 4 Form 7.8 amended: SI 2009/2472.

NOTES 8, 11--SI 1986/1925 Sch 4 Form 7.9 amended: SI 2009/2472.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/ (x) Private Examination/314. Orders for delivery of property or payment.

### **314. Orders for delivery of property or payment.**

If it appears to the court, on consideration of any evidence obtained under examination<sup>1</sup>, that any person has in his possession any property comprised in the bankrupt's estate<sup>2</sup>, the court may, on the application of the official receiver or the trustee of the bankrupt's estate<sup>3</sup>, order that person to deliver the whole or any part of the property to the official receiver or the trustee at such time, in such manner and on such terms as the court thinks fit<sup>4</sup>.

If it appears to the court, on consideration of any evidence so obtained, that any person is indebted to the bankrupt, the court may, on the application of the official receiver or the trustee of the bankrupt's estate, order that person to pay him, at such time and in such manner as the court may direct, the whole or any part of the amount due, whether in full discharge of the debt or otherwise, as the court thinks fit<sup>5</sup>.

1    le under the Insolvency Act 1986 s 366 or s 367: see *infra*; and para 307 et seq ante.

2    For the meaning of 'the bankrupt's estate' see para 216 ante.

3    See para 307 ante.

4    Insolvency Act 1986 s 367(1). As to the application of s 367: (1) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition; or (2) where an interim receiver has been appointed, see para 307 note 8 ante.

5    Ibid s 367(2).

## **UPDATE**

### **216-315 Protection of bankrupt's estate; investigation of his affairs**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(9) PROTECTION OF BANKRUPT'S ESTATE; INVESTIGATION OF HIS AFFAIRS/ (x) Private Examination/315. Costs of examination.

### **315. Costs of examination.**

Where the court has ordered an examination of any person<sup>1</sup> and it appears to it that the examination was made necessary because information had been unjustifiably refused by the respondent<sup>2</sup>, it may order that the costs of the examination be paid by him<sup>3</sup>.

Where the court makes an order against a person to deliver up property in his possession which belongs to the bankrupt<sup>4</sup>, or to pay any amount in discharge of a debt due to the bankrupt<sup>5</sup>, the costs of the application for the order may be ordered by the court to be paid by the respondent<sup>6</sup>. Otherwise the applicant's costs must be paid out of the bankrupt's estate, unless the court otherwise orders<sup>7</sup>. A person summoned to attend for examination must be tendered a reasonable sum in respect of travelling expenses incurred in connection with his attendance; but other costs falling on him are at the court's discretion<sup>8</sup>. Where the examination

is on the application of the official receiver otherwise than in the capacity of trustee, no order may be made for the payment of costs by him<sup>9</sup>.

- 1 le under the Insolvency Act 1986 s 366: see para 307 et seq ante.
- 2 For the meaning of 'the respondent' see para 309 note 3 ante.
- 3 Insolvency Rules 1986, SI 1986/1925, r 9.6(1).
- 4 le under the Insolvency Act 1986 s 367(1): see para 314 ante.
- 5 le under ibid s 367(2): see para 314 ante.
- 6 Insolvency Rules 1986, SI 1986/1925, rr 9.1(2)(c), 9.6(2).
- 7 Ibid rr 9.6(3), 13.8.
- 8 Ibid r 9.6(4). The discretion to award costs to the respondent extends not only to the costs of an oral examination but also to the costs of complying with other orders which may be made: *Re Aveling Barford Ltd* [1988] 3 All ER 1019, [1989] 1 WLR 360; *British & Commonwealth Holdings plc (Joint Administrators) v Spicer and Oppenheim (a firm)* [1993] AC 426, [1992] 4 All ER 876, HL. In the normal case the costs of complying with an order for the production of documents will fall on the respondent: *Morris v Director of Serious Fraud Office* [1993] Ch 372, [1993] 1 All ER 788; *Re Cloverbay Ltd* [1989] BCLC 724, 5 BCC 732.
- 9 Insolvency Rules 1986, SI 1986/1925, r 9.6(5).

## UPDATE

### 216-315 Protection of bankrupt's estate; investigation of his affairs

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 315 Costs of examination

TEXT AND NOTE 7--SI 1986/1925 r 9.6(3) amended: SI 2008/737, SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/316. Trustee to be insolvency practitioner.

## (10) TRUSTEE IN BANKRUPTCY

### (i) Appointment of Trustee

#### 316. Trustee to be insolvency practitioner.

No person may be appointed as trustee of a bankrupt's estate unless he is, at the time of the appointment, qualified to act as an insolvency practitioner in relation to the bankrupt<sup>1</sup>.

<sup>1</sup> Insolvency Act 1986 ss 292(2), 388(2)(a). As to insolvency practitioners and their qualification see para 42 et seq ante. Nothing in s 388 (as amended) applies to anything done by the official receiver: see s 388(5)(a) (substituted by the Bankruptcy (Scotland) Act 1993 s 11(1)); and para 43 ante. As to the application of the

Insolvency Act 1986 ss 292, 388 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see paras 265 note 3, 43 note 1 respectively ante.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **316 Trustee to be insolvency practitioner**

NOTE 1--Nothing in the 1986 Act s 388 applies to anything done (whether in the United Kingdom or elsewhere) in relation to insolvency proceedings under EC Council Regulation 1346/2000 in a member state other than the United Kingdom: 1986 Act s 388(6) (added by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/317. Power to appoint trustee.

### **317. Power to appoint trustee.**

The power to appoint a person as trustee of a bankrupt's estate, whether the first such trustee or a trustee appointed to fill any vacancy, is exercisable:

- 490 (1) except at a time when a certificate for the summary administration of the bankrupt's estate is in force<sup>1</sup>, by a general meeting of the bankrupt's creditors<sup>2</sup>;
- 491 (2) by the Secretary of State<sup>3</sup>; or
- 492 (3) by the court<sup>4</sup>.

Any power to appoint a person as trustee of a bankrupt's estate includes power to appoint two or more persons as joint trustees; but such an appointment must make provision as to the circumstances in which the trustees must act together and the circumstances in which one or more of them may act for the others<sup>5</sup>.

The appointment of any person as trustee takes effect only if that person accepts the appointment in accordance with the Insolvency Rules 1986<sup>6</sup>; but, subject to that qualification, the appointment of any person as trustee takes effect at the time specified in his certificate of appointment<sup>7</sup>.

1    le under the Insolvency Act 1986 s 275: see para 206 et seq ante.

2    As to creditors' meetings see para 270 et seq ante.

3    le under the Insolvency Act 1986 s 295(2) (see para 321 post), s 296(2) (see para 321 post) or s 300(6) (see para 368 post).

4 Ibid s 292(1). The appointment by the court is under s 297 (see para 322 post): s 292(1). Section 292 is without prejudice to the provisions of Pt IX Ch III (ss 292-304) (as amended) under which the official receiver is, in certain circumstances, to be trustee of the estate: s 292(5). As to such circumstances see para 323 post.

As to the application of s 292 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

As to the modification of s 292 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1247-1248, 1275.

5 Insolvency Act 1986 s 292(3).

6 Ie the Insolvency Rules 1986, SI 1986/1925 (as amended).

7 Insolvency Act 1986 s 292(4).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 317 Power to appoint trustee

TEXT AND NOTE 1--Words 'except at a time ... is in force' omitted: Insolvency Act 1986 s 292(1) (amended by the Enterprise Act 2002 Sch 23 para 6, Sch 26).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/318. Summoning of meeting to appoint first trustee.

### 318. Summoning of meeting to appoint first trustee.

Where a bankruptcy order has been made<sup>1</sup> and no certificate for the summary administration of the bankrupt's estate has been issued<sup>2</sup>, it is the duty of the official receiver, as soon as practicable in the period of 12 weeks beginning with the day on which the order was made, to decide whether to summon a general meeting of the bankrupt's creditors for the purpose of appointing a trustee of the bankrupt's estate<sup>3</sup>. If the official receiver decides not to summon such a meeting, he must, before the end of the period of 12 weeks mentioned above, give notice of his decision to the court and to every creditor of the bankrupt who is known to the official receiver or is identified in the bankrupt's statement of affairs<sup>4</sup>.

1 As to bankruptcy orders see para 195 et seq ante.

2 Ie under the Insolvency Act 1986 s 275: see para 206 et seq ante.

3 Ibid s 293(1). Section 293 does not apply where the bankruptcy order was made on a petition under s 264(1)(d) (see para 124 head (4) ante); and it is subject to the provision made in s 294(3) (see para 319 post) and s 297(6) (see para 322 post): s 293(1). As to the prospective repeal of s 264(1)(d), and as to the prospective amendment of s 293(1), see para 844 note 2 post.

As to the application of s 293 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

As to the modification of s 293 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1231, 1276.

4 Insolvent Act 1986 s 293(2).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 318 Summoning of meeting to appoint first trustee

TEXT AND NOTE 2--Words 'and no certificate ... has been issued' omitted: Insolvency Act 1986 s 293(1) (amended by the Enterprise Act 2002 Sch 23 para 7, Sch 26).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/319. Power of creditors to requisition meeting.

### 319. Power of creditors to requisition meeting.

Where, in the case of any bankruptcy:

- 493 (1) the official receiver has not yet summoned, or has decided not to summon, a general meeting of the bankrupt's creditors for the purpose of appointing the trustee<sup>1</sup>; and
- 494 (2) a certificate for the summary administration of the estate is not for the time being in force<sup>2</sup>,

any creditor of the bankrupt may request the official receiver to summon such a meeting for that purpose<sup>3</sup>.

If such a request appears to the official receiver to be made with the concurrence of not less than one-quarter, in value, of the bankrupt's creditors, including the creditor making the request, it is the duty of the official receiver to summon the requested meeting<sup>4</sup>.

1 le under the Insolvency Act 1986 s 293: see para 265 ante.

2 le under ibid s 275: see para 206 et seq ante.

3 Ibid s 294(1). As to the application of s 294 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

As to the modification of s 294 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1231, 1276.

4 Insolvency Act 1986 s 294(2). Accordingly, where the duty imposed by s 294(2) has arisen, the official receiver is required neither to reach a decision for the purposes of s 293(1) (see para 318 ante) nor, if he has reached one, to serve any notice under s 293(2) (see para 318 ante): s 294(3).

**UPDATE****316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

**319 Power of creditors to requisition meeting**

TEXT AND NOTE 2--Head (2) omitted: Insolvency Act 1986 s 294(1) (amended by the Enterprise Act 2002 Sch 23 para 8, Sch 26).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/320. Appointment by creditors' meeting.

**320. Appointment by creditors' meeting.**

Where a person has been appointed trustee by resolution of a creditors' meeting<sup>1</sup>, the chairman of the meeting must certify the appointment, but not unless and until the person to be appointed has provided him with a written statement to the effect that he is an insolvency practitioner duly qualified to act as trustee in relation to the bankrupt, and that he consents so to act<sup>2</sup>.

The trustee's appointment is effective from the date on which the appointment is certified, that date to be indorsed on the certificate<sup>3</sup>.

The chairman of the meeting, if not himself the official receiver, must send the certificate to the official receiver<sup>4</sup>; and the official receiver must in any case send the certificate to the trustee and file a copy of it in court<sup>5</sup>.

1 As to the creditors' meeting see para 319 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.120(1), (2). For the prescribed forms of appointment see rr 6.120, 12.5, Sch 4, Form 6.40 (certificate of appointment of trustee by creditors' meeting), Form 6.41 (certificate of appointment of two or more trustees by creditors' meeting). As to insolvency practitioners and their qualification see para 42 et seq ante.

3 Ibid r 6.120(1), (3) (substituted by SI 1987/1919).

4 Insolvency Rules 1986, SI 1986/1925, r 6.120(1), (4) (substituted by SI 1987/1919).

5 Insolvency Rules 1986, SI 1986/1925, r 6.120(1), (5) (added by SI 1987/1919). For the meaning of 'file in court' see para 95 note 10 ante.

**UPDATE****316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 320 Appointment by creditors' meeting

TEXT AND NOTES--See SI 1986/1925 r 6.120A (official receiver not to be appointed as trustee) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/321. Appointment by Secretary of State.

### 321. Appointment by Secretary of State.

If a meeting summoned<sup>1</sup> by the official receiver is held but no appointment of a person as trustee is made, it is the duty of the official receiver to decide whether to refer the need for an appointment to the Secretary of State<sup>2</sup>. On a reference made in pursuance of that decision, the Secretary of State must either make an appointment or decline to make one<sup>3</sup>.

If the official receiver decides not to refer the need for an appointment to the Secretary of State, or on such a reference the Secretary of State declines to make an appointment, the official receiver must give notice of his decision or, as the case may be, of the Secretary of State's decision to the court<sup>4</sup>. As from the giving of such notice in a case where no notice has been given by the official receiver of his decision not to summon a meeting of creditors<sup>5</sup>, the official receiver is the trustee of the bankrupt's estate<sup>6</sup>.

At any time when the official receiver is the trustee of a bankrupt's estate by virtue of any provision of the Insolvency Act 1986, other than where a bankruptcy order is made where a criminal bankruptcy order has been made against the debtor<sup>7</sup>, he may apply to the Secretary of State for the appointment of a person as trustee instead of the official receiver<sup>8</sup>. On such an application the Secretary of State must either make an appointment or decline to make one<sup>9</sup>.

Where the trustee of a bankrupt's estate has been appointed by the Secretary of State<sup>10</sup>, the trustee must give notice to the bankrupt's creditors of his appointment or, if the court so allows, must advertise his appointment in accordance with the court's directions<sup>11</sup>. In that notice or advertisement the trustee must:

- 495 (1) state whether he proposes to summon a general meeting of the bankrupt's creditors for the purpose of establishing a creditors' committee<sup>12</sup>; and
- 496 (2) if he does not propose to summon such a meeting, set out the power of the creditors<sup>13</sup> to require him to summon one<sup>14</sup>.

Where the official receiver refers<sup>15</sup> to the Secretary of State the need for an appointment of a trustee, or applies<sup>16</sup> to the Secretary of State to make the appointment, then, if the Secretary of State makes an appointment, he must send two copies of the certificate of appointment to the official receiver, who must transmit one such copy to the person appointed, and file the other copy in court<sup>17</sup>. The certificate must specify the date from which the trustee's appointment is effective<sup>17</sup>.

1 le under the Insolvency Act 1986 s 293 (see para 318 ante) or s 294 (see para 319 ante).

2 Ibid s 295(1). As to the application of s 295 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.



As to the modification of s 295 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1232, 1277.

3 Insolvent Act 1986 s 295(2).

4 Ibid s 295(3).

5 Ie under ibid s 293(2): see para 318 ante.

6 Ibid s 295(4).

7 Ie by virtue of any provision in ibid Pt IX Ch III (ss 292-304) (as amended), other than s 297(1) (see para 323 post). As to the prospective repeal of s 297(1) see para 844 note 2 post.

8 Ibid s 296(1). As to the application of s 296 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

As to the modification of s 296 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1278.

9 Insolvent Act 1986 s 296(2). Such an application may be made notwithstanding that the Secretary of State has declined to make an appointment either on a previous application under s 296(1) or on a reference under s 295 or under s 300(4) (see para 368 post): s 296(3).

10 Ie whether under ibid s 296 or otherwise.

11 Ibid s 296(4).

12 Ie under ibid s 301: see para 328 et seq post.

13 Ie under ibid Pt IX (ss 264-371) (as amended).

14 Ibid s 296(5).

15 Ie under ibid s 295 (see supra) or s 300 (see para 368 post).

16 Ie under ibid s 296: see supra.

17 Insolvent Rules 1986, SI 1986/1925, r 6.122(1), (2). For the meaning of 'file in court' see para 95 note 10 ante.

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvent Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/322. Appointment by the court.

### 322. Appointment by the court.

Where a certificate for the summary administration of a bankrupt's estate is issued or is in force<sup>1</sup>, the court may appoint a person other than the official receiver as trustee<sup>2</sup>.

Where a bankruptcy order is made in a case in which an insolvency practitioner's report has been submitted to the court<sup>3</sup> but no certificate for the summary administration of the estate is issued, the court, if it thinks fit, may, on making the order, appoint the person who made the report as trustee<sup>4</sup>.

Where a bankruptcy order is made, whether or not on a petition<sup>5</sup> by the supervisor of, or any person, other than the individual, who is for the time being bound by, a voluntary arrangement proposed by the individual and approved under Part VIII of the Insolvency Act 1986, at a time when there is a supervisor<sup>6</sup> of a voluntary arrangement approved in relation to the bankrupt, the court, if it thinks fit, may, on making the order, appoint the supervisor of the arrangement as trustee<sup>7</sup>.

Where the trustee of a bankrupt's estate has been appointed by the court, the trustee must give notice to the bankrupt's creditors of his appointment or, if the court so allows, must advertise his appointment in accordance with the directions of the court<sup>8</sup>. In that notice or advertisement he must:

- 497 (1) state whether he proposes to summon a general meeting of the bankrupt's creditors for the purpose of establishing a creditors' committee<sup>9</sup>; and
- 498 (2) if he does not propose to summon such a meeting, set out the power of the creditors<sup>10</sup> to require him to summon one<sup>11</sup>.

Where the court appoints the trustee<sup>12</sup>, the court's order may not issue unless and until the person appointed has filed in court<sup>13</sup> a statement to the effect that he is an insolvency practitioner duly qualified to be the trustee, and that he consents to act<sup>14</sup>. Thereafter, the court must send two copies of the order to the official receiver; and one of those copies must be sealed, and this must be sent by him to the person appointed as trustee<sup>15</sup>. The trustee's appointment takes effect from the date of the order<sup>16</sup>.

1 le under the Insolvency Act 1986 s 275: see para 206 et seq ante.

2 Ibid s 297(3). As to the application of s 297 in the case of the administration in bankruptcy of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

In the case of an individual member of an insolvent partnership itself being wound up as an unregistered company (see para 817 et seq post), s 297 is in certain circumstances to be omitted: see the Insolvent Partnerships Order 1994, SI 1994/2421, arts 8(6), (7)(a), 10(4), (5)(a); paras 820, 821 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1260. As to the modification in other circumstances of the Insolvency Act 1986 s 297 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1279.

3 le under the Insolvency Act 1986 s 274: see para 202 ante.

4 Ibid s 297(4). Where an appointment is made under s 297(4) or s 297(5) (see infra), the official receiver is not under the duty imposed by s 293(1) (see para 318 ante) to decide whether or not to summon a meeting of creditors: s 297(6).

5 le under ibid s 264(1)(c): see para 124 head (3) ante.

6 As to the supervisor of a voluntary arrangement see para 108 et seq ante.

7 Insolvency Act 1986 s 297(5). See also note 4 supra.

8 Ibid s 297(7).

9 le under ibid s 301: see para 328 et seq post.

10 le under ibid Pt IX (ss 264-371) (as amended).

11 Ibid s 297(8).

12 le under *ibid* s 297(3), (4) or (5): see *supra*.

13 For the meaning of 'file in court' see para 95 note 10 *ante*.

14 Insolvency Rules 1986, SI 1986/1925, r 6.121(1), (2). For the prescribed forms of orders of court see rr 6.121, 12.7(1), (2), Sch 4, Form 6.42 (order of court appointing trustee), Form 6.43 (order of court appointing two or more trustees). As to insolvency practitioners and their qualification see para 42 *et seq ante*.

15 *Ibid* r 6.121(1), (3).

16 *Ibid* r 6.121(1), (4).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 322 Appointment by the court

TEXT AND NOTES 1, 2--Insolvency Act 1986 s 297(3) repealed: Enterprise Act 2002 Sch 23 para 9(a), Sch 26.

TEXT AND NOTE 4--Words 'but no certificate ... is issued' omitted: 1986 Act s 297(4) (amended by the 2002 Act Sch 23 para 9(b), Sch 26).

NOTES 14-16--SI 1986/1925 r 6.121(1) amended: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/323. Official receiver as trustee.

### 323. Official receiver as trustee.

If the official receiver decides not to summon a meeting of a bankrupt's creditors<sup>1</sup> and gives notice of such decision in accordance with the statutory provisions<sup>2</sup>, he is, as from the giving of such notice to the court, the trustee of the bankrupt's estate<sup>3</sup>.

If a meeting of a bankrupt's creditors is summoned<sup>4</sup> and held but no appointment of a person as trustee is made, then as from the giving of notice by the official receiver of his decision not to refer the need for an appointment to the Secretary of State, or on such a reference of the Secretary of State's decision to decline to make an appointment, the official receiver is<sup>5</sup> the trustee of the bankrupt's estate<sup>6</sup>.

Where a bankruptcy order is made on a petition<sup>7</sup> in the case of a criminal bankruptcy order being made against an individual, the official receiver is the trustee of the bankrupt's estate<sup>8</sup>.

Where the court issues a certificate for the summary administration of a bankrupt's estate<sup>9</sup>, the official receiver is, as from the issue of that certificate, the trustee<sup>10</sup>. Where, however, such a certificate is issued or is in force, the court may, if it thinks fit, appoint a person other than the official receiver as trustee<sup>11</sup>.

1 le under the Insolvency Act 1986 s 293: see para 318 ante.

2 See para 318 ante.

3 See the Insolvency Act 1986 s 293(2), (3); and para 318 ante. As to the application of s 293 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

In the case of a person adjudged bankrupt before 29 December 1986 (see para 2 ante), or adjudged bankrupt on or after that day on a petition presented before that day, the official receiver may at any time when he is the trustee of the bankrupt's estate apply for the appointment of a person as trustee instead of the official receiver; and on any such application the Secretary of State must either make an appointment or decline to make one: s 437, Sch 11 para 14(1), (2).

4 le under *ibid* s 293 (see para 318 ante) or s 294 (see para 319 ante).

5 le in a case in which no notice has been given under *ibid* s 293(2): see *supra*.

6 *Ibid* s 295(4). See further para 321 ante. As to the application of s 295 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

7 le under *ibid* s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 post.

8 *Ibid* s 297(1). As to the prospective repeal of s 297(1) see para 844 note 2 post. As to the application of s 297 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

In the case of an individual member of an insolvent partnership itself being wound up as an unregistered company (see para 817 et seq post), s 297 is in certain circumstances to be omitted: see the Insolvent Partnerships Order 1994, SI 1994/2421, arts 8(6), (7)(a), 10(4), (5)(a); paras 820, 822 post; and *COMPANY AND PARTNERSHIP INSOLVENCY* vol 7(4) (2004 Reissue) para 1260. As to the modification in other circumstances of the Insolvency Act 1986 s 297 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 822 post; and *COMPANY AND PARTNERSHIP INSOLVENCY* vol 7(4) (2004 Reissue) para 1279.

9 le under the Insolvency Act 1986 s 275: see para 188 et seq ante.

10 *Ibid* s 297(2).

11 *Ibid* s 297(3). See further para 322 text and note 2 ante.

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in *PARA 2 NOTE 5*.

### 323 Official receiver as trustee

TEXT AND NOTES 9-11--Insolvency Act 1986 s 297(2), (3) repealed: Enterprise Act 2002 Sch 23 para 9(a), Sch 26.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/324. Authentication of appointment.

### 324. Authentication of appointment.

Where a trustee is appointed by a creditors' meeting<sup>1</sup>, the court<sup>2</sup> or the Secretary of State<sup>3</sup>, a sealed copy of the order of appointment or, as the case may be, a copy of the certificate of his appointment may in any proceedings be adduced as proof that he is duly authorised to exercise the powers and perform the duties of trustee of the bankrupt's estate<sup>4</sup>.

1    Ie under the Insolvency Rules 1986, SI 1986/1925, r 6.120 (as amended): see para 320 ante.

2    Ie under *ibid* r 6.121: see para 322 ante.

3    Ie under *ibid* r 6.122: see para 321 ante.

4    *Ibid* r 6.123.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in **PARA 2 NOTE 5**.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/325. Advertisement of appointment.

### **325. Advertisement of appointment.**

Where the trustee is appointed by a creditors' meeting<sup>1</sup>, he must, forthwith after receiving his certificate of appointment, give notice of his appointment in such newspaper as he thinks most appropriate for ensuring that it comes to the notice of the bankrupt's creditors<sup>2</sup>.

The expense of giving the notice must be borne in the first instance by the trustee; but he is entitled to be reimbursed by the estate, as an expense of the bankruptcy<sup>3</sup>.

1    Ie under the Insolvency Rules 1986, SI 1986/1925, r 6.120 (as amended): see para 320 ante.

2    *Ibid* r 6.124(1).

3    *Ibid* r 6.124(2). Rule 6.124(2) applies also in the case of the notice or advertisement under the Insolvency Act 1986 s 296(4) (see para 321 ante) and of the notice or advertisement under s 297(7) (see para 322 ante): Insolvency Rules 1986, SI 1986/1925, r 6.124(2).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in **PARA 2 NOTE 5**.

### **325 Advertisement of appointment**

TEXT AND NOTES 1, 2--SI 1986/1925 r 6.124(1) substituted: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/326. Trustee's style.

### **326. Trustee's style.**

The official name of the trustee is 'the trustee of the estate of . . . a bankrupt' (inserting the name of the bankrupt); but he may be referred to as 'the trustee in bankruptcy' of the particular bankrupt<sup>1</sup>.

1 Insolvency Act 1986 s 305(4). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 305 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 20. As to the administration in bankruptcy of the insolvent estates of deceased persons see further paras 456 note 4, 823 et seq post.

As to the modification of the Insolvency Act 1986 s 305 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1284.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(i) Appointment of Trustee/327. Hand-over of assets to trustee.

### **327. Hand-over of assets to trustee.**

Where the bankrupt's estate vests in the trustee<sup>1</sup> following a period in which the official receiver is the receiver and manager of the estate<sup>2</sup>, or the trustee is appointed in succession to the official receiver acting as trustee, then, when the trustee's appointment takes effect, the official receiver must forthwith do all that is required for putting him into possession of the estate<sup>3</sup>.

On taking possession of the estate, the trustee must discharge any balance due to the official receiver on account of:

- 499 (1) expenses properly incurred by him and payable under the Insolvency Act 1986 or the Insolvency Rules 1986; and
- 500 (2) any advances made by him in respect of the estate, together with interest on such advances at the specified rate<sup>4</sup> on the date of the bankruptcy order<sup>5</sup>.

Alternatively, the trustee may, before taking office, give to the official receiver a written undertaking to discharge any such balance out of the first realisation of assets<sup>6</sup>.

The official receiver has a charge on the estate in respect of any sums due to him under the above provisions<sup>7</sup>; but, where the trustee has realised assets with a view to making those payments, the official receiver's charge does not extend in respect of sums deductible by the trustee from the proceeds of realisation, as being expenses properly incurred therein<sup>8</sup>.

The trustee must from time to time out of the realisation of assets discharge all guarantees properly given by the official receiver for the benefit of the estate, and must pay all the official receiver's expenses<sup>9</sup>.

The official receiver must give to the trustee all such information, relating to the affairs of the bankrupt and the course of the bankruptcy, as he, the official receiver, considers to be reasonably required for the effective discharge by the trustee of his duties in relation to the estate<sup>10</sup>.

The trustee must also be furnished with any report of the official receiver<sup>11</sup> under the provisions of the Insolvency Rules 1986<sup>12</sup>.

1    Ie under the Insolvency Act 1986 Pt IX Ch IV (ss 305-335) (as amended): see para 390 et seq post.

2    Ie according to *ibid* s 287: see para 233 ante.

3    Insolvency Rules 1986, SI 1986/1925, r 6.125(1), (2).

4    Ie at the rate specified in the Judgments Act 1838 s 17 (as amended): see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1307.

5    Insolvency Rules 1986, SI 1986/1925, r 6.125(3).

6    *Ibid* r 6.125(4).

7    Ie under *ibid* r 6.125(3): see *supra*.

8    *Ibid* r 6.125(5).

9    *Ibid* r 6.125(6).

10   *Ibid* r 6.125(7).

11   Ie under *ibid* rr 6.73-6.78 (as amended): see paras 257-261 ante.

12   *Ibid* r 6.125(8).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/328. Creditors' committee.

## (ii) Control of Trustee

### 328. Creditors' committee.

A general meeting of the bankrupt's creditors<sup>1</sup> may, in accordance with the Insolvency Rules 1986<sup>2</sup>, establish a committee ('the creditors' committee') to exercise the functions conferred on it by or under the Insolvency Act 1986<sup>3</sup>. A general meeting of the bankrupt's creditors may not, however, establish such a committee, or confer any functions on such a committee, at any time when the official receiver is the trustee of the bankrupt's estate, except in connection with an appointment made by that meeting of a person to be trustee instead of the official receiver<sup>4</sup>.

1   le whether summoned under the Insolvency Act 1986 ss 292-300 or otherwise.

2   le in accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended).

3   Insolvency Act 1986 s 301(1). As to the application of s 301 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

As to the modification of s 301 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1235, 1283.

4   Insolvency Act 1986 s 301(2).

### UPDATE

#### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/329. Membership of the creditors' committee.

### 329. Membership of the creditors' committee.

The creditors' committee must consist of at least three, and not more than five, members<sup>1</sup>. All the members of the committee must be creditors of the bankrupt, and any creditor, other than one who is fully secured<sup>2</sup>, may be a member so long as he has lodged a proof of his debt, and his proof has neither been wholly disallowed for voting purposes nor wholly rejected for the purposes of distribution or dividend<sup>3</sup>. A body corporate may be a member of the committee, but it cannot act as such otherwise than by a duly appointed representative<sup>4</sup>.

1   Insolvency Rules 1986, SI 1986/1925, r 6.150(1).

2   As to secured creditors see para 560 et seq post.

3   Insolvency Rules 1986, SI 1986/1925, r 6.150(2). As to proofs of debt see para 490 et seq post.

4   Ibid r 6.150(3). The body corporate's representative is appointed under r 6.156 (as amended) (see para 335 post): r 6.150(3).



## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/330. Formalities of appointment.

### 330. Formalities of appointment.

The creditors' committee does not come into being, and accordingly cannot act, until the trustee has issued a certificate of its due constitution<sup>1</sup>. If the chairman of the creditors' meeting which resolves to establish the committee is not the trustee, he must forthwith give notice of the resolution to the trustee, or, as the case may be, the person appointed as trustee by that same meeting, and inform him of the names and addresses of the persons elected to be members of the committee<sup>2</sup>.

No person may act as a member of the committee unless and until he has agreed to do so and, unless the relevant proxy contains a statement to the contrary, such agreement may be given by his proxy-holder present at the meeting establishing the committee<sup>3</sup>; and the trustee's certificate of the committee's due constitution may not issue before at least three persons elected to be members of the committee have agreed to act<sup>4</sup>. As and when the others, if any, agree to act, the trustee must issue an amended certificate<sup>5</sup>. The certificate, and any amended certificate, must be filed in court<sup>6</sup> by the trustee<sup>7</sup>.

If after the first establishment of the committee there is any change in its membership, the trustee must report the change to the court<sup>8</sup>.

The acts of the creditors' committee established for any bankruptcy are valid notwithstanding any defect in the appointment, election or qualifications of any member of the committee<sup>9</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.151(1). For the prescribed form of certificate see rr 6.151, 12.7(1), (2), Sch 4, Form 6.52.

2 Ibid r 6.151(2).

3 Ibid r 6.151(3) (substituted by SI 1987/1919). As to proxies see para 278 et seq ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.151(3A) (added by SI 1987/1919).

5 Insolvency Rules 1986, SI 1986/1925, r 6.151(4). For the prescribed form of amended certificate see rr 6.151, 12.7(1), (2), Sch 4, Form 6.52.

6 For the meaning of 'file in court' see para 95 note 10 ante.

7 Insolvency Rules 1986, SI 1986/1925, r 6.151(5).

8 Ibid r 6.151(6). For the prescribed form of report see rr 6.151, 12.7(1), (2), Sch 4, Form 6.53.

9 Insolvency Act 1986 s 377. As to the application of s 377 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 239 note 6 ante.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **330 Formalities of appointment**

NOTE 8--SI 1986/1925 Sch 4 Form 6.53 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/331. Obligations of trustee to committee.

#### **331. Obligations of trustee to committee.**

It is the duty of the trustee to report to the members of the creditors' committee all such matters as appear to him to be, or as they have indicated to him as being, of concern to them with respect to the bankruptcy<sup>1</sup>. However, in the case of matters so indicated to him by the committee, the trustee need not comply with any request for information where it appears to him that:

- 501 (1) the request is frivolous or unreasonable; or
- 502 (2) the cost of complying would be excessive, having regard to the relative importance of the information; or
- 503 (3) the estate is without funds sufficient for enabling him to comply<sup>2</sup>.

Where the committee has come into being more than 28 days after the appointment of the trustee, the latter must report to them, in summary form, what actions he has taken since his appointment, and must answer such questions as they may put to him regarding his conduct of the bankruptcy hitherto<sup>3</sup>.

A person who becomes a member of the committee at any time after its first establishment is not entitled to require a report to him by the trustee, otherwise than in summary form, of any matters previously arising<sup>4</sup>.

Nothing in the above provisions disentitles the committee, or any member of it, from having access to the trustee's records of the bankruptcy, or from seeking an explanation of any matter within the committee's responsibility<sup>5</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.152(1).

2 Ibid r 6.152(2).

3 Ibid r 6.152(3).

4 Ibid r 6.152(4).

5 Ibid r 6.152(5).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/332. Meetings of creditors' committee.

#### **332. Meetings of creditors' committee.**

Meetings of the creditors' committee must be held when and where determined by the trustee<sup>1</sup>. The trustee must, however, call a first meeting of the committee to take place within three months of his appointment or of the committee's establishment, whichever is the later; and thereafter he must call a meeting:

- 504 (1) if so requested by a member of the committee or his representative, the meeting then to be held within 21 days of the request being received by the trustee; and
- 505 (2) for a specified date, if the committee has previously resolved that a meeting be held on that date<sup>2</sup>.

The trustee must give seven days' notice in writing of the venue<sup>3</sup> of any meeting to every member of the committee, or his representative, if designated for that purpose, unless in any case the requirement of the notice has been waived by or on behalf of any member; and waiver may be signified either at or before the meeting<sup>4</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.153(1).

2 Ibid r 6.153(2).

3 For the meaning of 'venue' see para 84 note 21 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.153(3).

#### **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/333. Chairman at meetings.

### **333. Chairman at meetings.**

The chairman at any meeting of the creditors' committee must be the trustee, or a person appointed by him in writing to act<sup>1</sup>. A person so nominated must be either:

- 506 (1) one who is qualified to act as an insolvency practitioner in relation to the bankrupt<sup>2</sup>; or
- 507 (2) an employee of the trustee or his firm who is experienced in insolvency matters<sup>3</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.154(1).

2 As to insolvency practitioners and their qualification see para 42 et seq ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.154(2).

#### **UPDATE**

#### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/334. Quorum.

### **334. Quorum.**

A meeting of the committee is duly constituted if due notice of it has been given to all the members and at least two of the members are present or represented<sup>1</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.155.

#### **UPDATE**

#### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/335. Committee members' representatives.

### **335. Committee members' representatives.**

A member of the creditors' committee may, in relation to the business of the committee, be represented by another person duly authorised by him for that purpose<sup>1</sup>.

A person acting as a committee member's representative must hold a letter of authority entitling him so to act, either generally or specially, and signed by or on behalf of the committee member; and, for this purpose, any proxy in relation to any meeting of creditors of the bankrupt is, unless it contains a statement to the contrary, to be treated as such a letter of authority to act generally signed by or on behalf of the committee member<sup>2</sup>. The chairman at any meeting of the committee may call on a person claiming to act as a committee member's representative to produce his letter of authority, and may exclude him if it appears that his authority is deficient<sup>3</sup>.

No member may be represented by a body corporate, or by a person who is an undischarged bankrupt or is subject to a composition or arrangement with his creditors<sup>4</sup>.

No person may:

- 508 (1) on the same committee, act at one and the same time as representative of more than one committee member; or
- 509 (2) act both as a member of the committee and as representative of another member<sup>5</sup>.

Where the representative of a committee member signs any document on the latter's behalf, the fact that he so signs must be stated below his signature<sup>6</sup>.

The acts of the committee are valid notwithstanding any defect in the appointment or qualifications of any committee member's representative<sup>7</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.156(1).

2 Ibid r 6.156(2) (amended by SI 1987/1919). As to proxies see para 278 et seq ante.

3 Insolventcy Rules 1986, SI 1986/1925, r 6.156(3).

4 Ibid r 6.156(4).

5 Ibid r 6.156(5).

6 Ibid r 6.156(6).

7 Ibid r 6.156(7) (added by SI 1987/1919).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **335 Committee members' representatives**

NOTE 4--SI 1986/1925 r 156(4) amended: SI 2004/584.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/336. Voting rights and resolutions.

### **336. Voting rights and resolutions.**

At any meeting of the creditors' committee, each member, whether present himself or by his representative, has one vote; and a resolution is passed when a majority of the members present or represented have voted in favour of it<sup>1</sup>.

Every resolution passed must be recorded in writing, either separately or as part of the minutes of the meeting; and the record must be signed by the chairman and kept with the records of the bankruptcy<sup>2</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.161(1).

2 Ibid r 6.161(2).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/337. Resolutions by post.

### **337. Resolutions by post.**

The trustee may seek to obtain the agreement of members of the creditors' committee to a resolution by sending to every member, or his representative designated for the purpose, a copy of the proposed resolution<sup>1</sup>. Where the trustee makes use of this procedure, he must send out to members of the committee, or their representatives, as the case may be, a copy of any proposed resolution on which a decision is sought, which must be set out in such a way that agreement with or dissent from each separate resolution may be indicated by the recipient on the copy so sent<sup>2</sup>. Any member of the committee may, within seven business days<sup>3</sup> from the date of the trustee sending out a resolution, require the trustee to summon a meeting of the committee to consider the matters raised by the resolution<sup>4</sup>. In the absence of such a request, the resolution is deemed to have been carried in the committee if and when the trustee is notified in writing by a majority of the members that they concur with it<sup>5</sup>.

A copy of every resolution passed under the above provisions, and a note that the concurrence of the committee was obtained, must be kept with the records of the bankruptcy<sup>6</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.162(1).

2 Ibid r 6.162(2) (amended by SI 1987/1919).

- 3 For the meaning of 'business day' see para 95 note 11 ante.
- 4 Insolvency Rules 1986, SI 1986/1925, r 6.162(3) (amended by SI 1987/1919).
- 5 Insolvency Rules 1986, SI 1986/1925, r 6.162(4).
- 6 Ibid r 6.162(5).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/338. Trustee's reports.

#### **338. Trustee's reports.**

As and when directed by the creditors' committee, but not more often than once in any period of two months, the trustee must send a written report to every member of the committee setting out the position generally as regards the progress of the bankruptcy and matters arising in connection with it, to which he, the trustee, considers the committee's attention should be drawn<sup>1</sup>. In the absence of any such directions by the committee, the trustee must send such a report not less often than once in every period of six months<sup>2</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.163(1). The obligations imposed by r 6.163 are without prejudice to those imposed by r 6.152 (see para 331 ante): r 6.163(3).

<sup>2</sup> Ibid r 6.163(2).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/339. Expenses of members etc.

#### **339. Expenses of members etc.**

The trustee must defray out of the estate, in the prescribed order of priority<sup>1</sup>, any reasonable travelling expenses directly incurred by members of the creditors' committee or their

representatives in respect of their attendance at the committee's meetings, or otherwise on the committee's business<sup>2</sup>.

1 For the meaning of 'prescribed order of priority' see para 226 note 4 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.164.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/340. Dealings by committee members and others.

### **340. Dealings by committee members and others.**

No member of the creditors' committee, no committee member's representative, no person who is an associate<sup>1</sup> of a member of the committee or a committee member's representative, and no person who has been a member of the committee at any time in the last 12 months, may enter into any transaction whereby he:

- 510 (1) receives out of the estate any payment for services given or goods supplied in connection with the estate's administration; or
- 511 (2) obtains any profit from the administration; or
- 512 (3) acquires any asset forming part of the estate<sup>2</sup>.

Such a transaction may, however, be entered into by such a person:

- 513 (a) with the prior permission of the court; or
- 514 (b) if he does so as a matter of urgency, or by way of performance of a contract in force before the commencement of the bankruptcy, and obtains the court's permission for the transaction, having applied for it without undue delay; or
- 515 (c) with the prior sanction of the creditors' committee, where it is satisfied, after full disclosure of the circumstances, that the person will be giving full value in the transaction<sup>3</sup>.

Where in the committee a resolution is proposed that sanction be accorded for a transaction to be entered into which, without that sanction or the permission of the court, would be in contravention of the above provisions, no member of the committee, and no representative of a member, may vote if he is to participate directly or indirectly in the transaction<sup>4</sup>.

On the application of any person interested, the court may:

- 516 (i) set aside a transaction on the ground that it has been entered into in contravention of the above provisions; and



- 517 (ii) make with respect to it such other order as it thinks fit, including an order requiring a person to whom the above provisions apply to account for any profit obtained from the transaction and compensate the estate for any resultant loss<sup>5</sup>.

In the case of a person to whom these provisions apply as an associate of a member of the committee or of a committee member's representative, the court may not, however, make an order under heads (i) and (ii) above if satisfied that he entered into the relevant transaction without having any reason to suppose that, in doing so, he would contravene the above provisions<sup>6</sup>.

The costs of an application to the court under the above provisions do not fall on the estate, unless the court so orders<sup>7</sup>.

1 For the meaning of 'associate' see para 5 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.165(1), (2). As to the fiduciary duty of a committee member see *Re Bulmer, ex p Greaves* [1937] Ch 499, [1937] 1 All ER 323, CA. See also *Re FT Hawkins & Co Ltd* [1952] Ch 881, [1952] 2 All ER 467 (company case); *Taylor v Davies* [1920] AC 636 at 647, PC.

3 Insolvency Rules 1986, SI 1986/1925, r 6.165(3); and see eg *Re Spink (No 2), ex p Slater* (1913) 108 LT 811 (sanction given to trustee to pay member of committee of inspection for goods supplied to carry on bankrupt's business).

4 Insolvency Rules 1986, SI 1986/1925, r 6.165(4).

5 *Ibid* r 6.165(5).

6 *Ibid* r 6.165(6). In *Re Bulmer, ex p Greaves* [1937] Ch 499, [1937] 1 All ER 323, CA there was a purchase by the holder of a general proxy from a company which had been appointed a member of the committee of inspection. The purchaser was held to be in a fiduciary position, even though he did not know that the property belonged to the bankrupt's estate and he was held liable to account for any profit made.

7 Insolvency Rules 1986, SI 1986/1925, r 6.165(7).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/341. Resignation; termination of membership; removal.

### 341. Resignation; termination of membership; removal.

A member of the creditors' committee may resign by notice in writing delivered to the trustee<sup>1</sup>. A person's membership of the creditors' committee is automatically terminated if:

- 518 (1) he becomes bankrupt or compounds or arranges with his creditors; or

- 519 (2) at three consecutive meetings of the committee he is neither present nor represented, unless at the third of those meetings it is resolved that these provisions are not to apply in his case; or
- 520 (3) he ceases to be, or is found never to have been, a creditor<sup>2</sup>.

If, however, the cause of termination is the member's bankruptcy, his trustee in bankruptcy replaces him as a member of the committee<sup>3</sup>.

A member of the creditors' committee may be removed by resolution at a meeting of creditors, at least 14 days' notice having been given of the intention to move that resolution<sup>4</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.157.

2 Ibid r 6.158(1).

3 Ibid r 6.158(2).

4 Ibid r 6.159.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **341 Resignation; termination of membership; removal**

NOTE 2--Head (1), words 'or compounds or arranges with his creditors' omitted: SI 1986/1925 r 6.158(1) (amended by SI 2004/584).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/342. Vacancies.

### **342. Vacancies.**

If there is a vacancy in the membership of the creditors' committee, the vacancy need not be filled if the trustee and a majority of the remaining committee members so agree, provided that the number of members does not fall below the statutory minimum<sup>1</sup>.

The trustee may appoint any creditor, being qualified to be a member of the committee, to fill the vacancy, if a majority of the other members of the committee agree to the appointment and the creditor concerned consents to act<sup>2</sup>.

Alternatively, a meeting of creditors may resolve that a creditor be appointed, with his consent, to fill the vacancy; and, in this case, at least 14 days' notice must have been given of a resolution to make such an appointment, whether or not of a person named in the notice<sup>3</sup>.

Where the vacancy is filled by an appointment made by a creditors' meeting at which the trustee is not present, the chairman of the meeting must report to the trustee the appointment which has been made<sup>4</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.160(1), (2). The statutory minimum is that required by r 6.150(1) (see para 329 ante): r 6.160(2).

2 Ibid r 6.160(1), (3).

3 Ibid r 6.160(1), (4).

4 Ibid r 6.160(1), (5).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/343. Committee's functions vested in Secretary of State.

### 343. Committee's functions vested in Secretary of State.

The creditors' committee is not to be able or required to carry out its functions at any time when the official receiver is trustee of the bankrupt's estate<sup>1</sup>; but at any such time the functions of the committee under the Insolvency Act 1986 are vested in the Secretary of State, except to the extent that the Insolvency Rules 1986<sup>2</sup> otherwise provide<sup>3</sup>. Where, in the case of any bankruptcy, there is for the time being no creditors' committee and the trustee of the bankrupt's estate is a person other than the official receiver, the functions of such a committee are vested in the Secretary of State, except to the extent that the Insolvency Rules 1986 otherwise provide<sup>4</sup>.

1 See para 323 ante.

2 I.e. the Insolvency Rules 1986, SI 1986/1925 (as amended). At any time when the functions of the creditors' committee are vested in the Secretary of State under the Insolvency Act 1986 s 302(1) or (2), requirements of the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended) about notices to be given, or reports to be made, to the committee by the trustee do not apply, otherwise than as enabling the committee to require a report as to any matter; and, where the committee's functions are so vested under the Insolvency Act 1986 s 302(2), they may be exercised by the official receiver: Insolvency Rules 1986, SI 1986/1925, r 6.166(1), (2).

3 Insolvency Act 1986 s 302(1). As to the application of s 302 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

As to the modification of s 302 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 820 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1235.

4 Insolvency Act 1986 s 302(2).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ii) Control of Trustee/344. Control by the court.

### 344. Control by the court.

If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit<sup>1</sup>. The trustee of a bankrupt's estate may apply to the court for directions in relation to any particular matter arising under the bankruptcy<sup>2</sup>.

1 Insolvency Act 1986 s 303(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 303 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 19. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

As to the modification of the Insolvency Act 1986 s 303 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 820 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1294.

The Insolvency Act 1986 s 303(1) re-enacts the Bankruptcy Act 1914 s 80 (repealed) with three variations:

- 67 (1) the applicant under the Insolvency Act 1986 s 303(1) must be 'dissatisfied', whereas under the Bankruptcy Act 1914 s 80 (repealed) he had to be 'aggrieved'; but it is unlikely that this change of wording constitutes a material alteration. 'It may be that no change of substance was intended by the change in wording, but "dissatisfied" is certainly no narrower than "aggrieved", and is arguably wider. But in any event the words "person aggrieved" were interpreted as words "of wide import which should not be given a restrictive interpretation": *Re Cook* [1999] BPIR 881 at 883; and see *Mahomed v Morris* [2000] 2 BCLC 536; *Re Edenote Ltd, Tottenham Hotspur plc v Ryman* [1995] 2 BCLC 248, [1995] BCC 389 (company cases). 'A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something': *Re Sidebotham, ex p Sidebotham* (1880) 14 ChD 458 at 465 per James LJ. 'But the definition of James LJ is not to be regarded as exhaustive. The words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests': *A-G of Gambia v N'jie* [1961] AC 617 at 634, [1961] 2 All ER 504 at 511, PC per Lord Denning. See also *Re Whelan, ex p Sadler* (1878) 48 LJ Bcy 43; *Re Reed, Bowen & Co, ex p Official Receiver* (1887) 19 QBD 174; *Re Baron, ex p Debtor v Official Receiver* [1943] Ch 177, [1943] 2 All ER 662. It would seem unlikely that the court will entertain an application by a person whose dissatisfaction did not arise through his being prejudicially affected by the trustee's act, decision or omission in question;
- 68 (2) the word 'omission' has been added; thus the trustee's inactivity or neglect may found the requisite dissatisfaction;
- 69 (3) the words 'may give him directions' have been added; under the Bankruptcy Act 1914 s 80 (repealed) the court was previously empowered to make 'such order in the premises as it thinks just'.

As to the circumstances in which the court would interfere under s 80 (repealed) see *Re Peters, ex p Lloyd* (1882) 47 LT 64, CA (the court will not interfere with the discretion of a trustee unless it is shown that the

trustee is acting so very absurdly that no reasonable person would so act); *Re A Debtor (No 400 of 1940)*, *ex p Debtor v Dodwell (Trustee)* [1949] Ch 236, [1949] 1 All ER 510 (the court will not on the application of the bankrupt interfere in the day to day administration of the estate, nor is the bankrupt entitled to question the exercise by the trustee in good faith of his discretion or to hold the trustee accountable for an error of judgment). In the latter case Harman J pointed out that, so far as the trustee's duties to supply accounts was concerned, the bankrupt was not concerned except as to any surplus. Harman J did not, however, attempt to define all the circumstances in which the court could interfere at the instance of the bankrupt.

The Insolvency Act 1986 s 303(1) provides a protective supervision of the insolvency administration so as to protect the bankrupt from any injustice caused by his inability to bring or defend proceedings after adjudication: see *Heath v Tang*, *Stevens v Peacock* [1993] 4 All ER 694, [1993] 1 WLR 1421, CA; *Green v Satsangi* [1998] 1 BCLC 458, [1998] BPIR 55. See further *Hamilton v Official Receiver* [1998] BPIR 602; *Re Hans Place Ltd (in liquidation)* [1993] BCLC 768, [1993] BCC 737; *Leon v York-o-Matic Ltd* [1966] 3 All ER 277, [1966] 1 WLR 1450; *Re Edennotte Ltd*, *Tottenham Hotspur plc v Ryman* [1995] 2 BCLC 248, [1995] BCC 389 (company cases); the Insolvency Act 1986 s 168(1) and COMPANIES vol 7(3) (2004 Reissue) para 572.

2 Insolvency Act 1986 s 303(2). See *Craig v Humberclyde Industrial Finance Group Ltd* [1999] 1 WLR 129, sub nom *Re Hinckley Island Hotel Ltd*, *Craig v Humberclyde Industrial Finance Group Ltd* [1998] 2 BCLC 526, CA (company case); the Insolvency Act 1986 s 168(2); and COMPANIES vol 7(4) (2004 Reissue) para 744.

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(iii) Bankrupt's Duties in relation to the Trustee/345. Bankrupt's duties in relation to trustee.

### (iii) Bankrupt's Duties in relation to the Trustee

#### 345. Bankrupt's duties in relation to trustee.

The bankrupt must:

- 521 (1) give to the trustee such information as to his affairs;
- 522 (2) attend on the trustee at such times; and
- 523 (3) do all such other things,

as the trustee may for the purposes of carrying out his functions reasonably require; and this provision applies to a bankrupt after his discharge<sup>1</sup>.

If the bankrupt without reasonable excuse fails to comply with any such obligation, he is guilty of contempt of court and liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>2</sup>.

1 Insolvency Act 1986 s 333(1), (3). As to circumstances where s 333 has been applied see *Fryer and Thompson v Brook* [1998] BPIR 687, CA (bankrupt not entitled to raise defences to possession proceedings which are inconsistent with his duty to assist realisation of property vested in the trustee); *Christofi v Barclays Bank plc* [1998] 2 All ER 484, [1998] 1 WLR 1245 (under the Bankruptcy Act 1914 a bankrupt was not entitled to insist that his bankers do not provide information required by trustee) As to discharge from bankruptcy see para 629 et seq post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 333 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 26. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

2 Insolvency Act 1986 s 333(4). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq; and as to offences see para 707 et seq post. For the prescribed form of affidavit in support of an application for committal for contempt of court see the Insolvency Rules 1986, SI 1986/1925, rr 12.7(1), (2), Sch 4, Form 7.15 (substituted by SI 1991/495); and for the prescribed form of warrant of committal for contempt see the Insolvency Rules 1986, SI 1986/1925, Sch 4, Form 7.17. An injunction may be granted against the bankrupt if he fails to co-operate restraining him from leaving the jurisdiction: *Morris v Murjani* [1996] 2 All ER 384, [1996] 1 WLR 848.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **345 Bankrupt's duties in relation to trustee**

NOTE 2--SI 1986/1925 Sch 4 Forms 7.15, 7.17 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(iv) Liability of the Trustee/346. Restoration of money etc.

## **(iv) Liability of the Trustee**

### **346. Restoration of money etc.**

Where, on an application under the Insolvency Act 1986<sup>1</sup>, the court is satisfied:

- 524 (1) that the trustee of a bankrupt's estate has misapplied or retained, or become accountable for, any money or other property comprised in the bankrupt's estate; or
- 525 (2) that a bankrupt's estate has suffered any loss in consequence of any misfeasance or breach of fiduciary or other duty by a trustee of the estate in the carrying out of his functions,

the court may order the trustee, for the benefit of the estate, to repay, restore or account for money or other property, together with interest at such rate as the court thinks just, or, as the case may be, to pay such sum by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just<sup>2</sup>.

The above provisions are, however, without prejudice to any liability arising apart therefrom<sup>2</sup>.

Such an application may be made by the official receiver, the Secretary of State, a creditor of the bankrupt or, whether or not there is, or is likely to be, a surplus on final distribution<sup>3</sup>, the bankrupt himself; but the permission of the court is required for the making of an application if it is to be made by the bankrupt or if it is to be made after the trustee has had his release<sup>4</sup>.

1 le on an application under the Insolvency Act 1986 s 304: see *infra*. As to the mode of application and the procedure see para 764 *et seq post*.

2 Ibid s 304(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 304 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1, Pt II para 19. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 *et seq post*.

In the case of a person adjudged bankrupt before 29 December 1986 (see para 2 *ante*), or adjudged bankrupt on or after that day on a petition presented before that day, where on 29 December 1986 the trustee of a bankrupt's estate has not made an application under the Bankruptcy Act 1914 s 93 (repealed) (release of trustee), then: (1) except where the Secretary of State otherwise directs, the Insolvency Act 1986 s 298(8) (see para 370 *post*), s 304 (see *infra*; and para 347 *post*), s 331(1)-(3) (see para 606 *post*) apply, and the Bankruptcy Act 1914 (repealed) does not apply, in relation to any trustee of the bankrupt's estate who holds office on or at any time after 29 December 1986 and is not the official receiver; (2) the Insolvency Act 1986 s 331(4) (see para 606 *post*) applies in relation to the carrying out at any time on or after 29 December 1986 by the trustee of the bankrupt's estate of any of his functions; and (3) a trustee in relation to whom s 298(8) (see para 370 *post*) has effect by virtue of head (1) *supra* has his release with effect from the time specified in s 299(3)(d) (see para 378 *post*): s 437, Sch 11 para 14(1), (3).

Cf s 212 (summary remedy against delinquent directors, liquidators etc): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 688 *et seq*. It is submitted that the court will approach applications under s 304(1) in respect of trustees in bankruptcy in a like manner to applications under s 212 which has a long statutory history.

3 le a surplus for the purposes of *ibid* s 330(5): see para 605 *post*.

4 Ibid s 304(2). The trustee has his release under s 299: see para 375 *et seq post*. Cf s 212(3) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 688) under which it was held that an applicant must have a pecuniary interest in the success of the application, and accordingly a fully-paid shareholder was precluded from applying where the company's liabilities exceeded its assets and would still do so even if the application were successful: *Cavendish-Bentinck v Fenn* (1887) 12 App Cas 652, HL.

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(iv) Liability of the Trustee/347. Seizure of property not belonging to the estate.

#### 347. Seizure of property not belonging to the estate.

Where the trustee seizes or disposes of any property which is not comprised in the bankrupt's estate, and at the time of the seizure or disposal the trustee believes, and has reasonable grounds for believing, that he is entitled, whether in pursuance of an order of the court or otherwise, to seize or dispose of that property, the trustee is not liable to any person, whether under these provisions or otherwise, in respect of any loss or damage resulting from the seizure or disposal, except in so far as that loss or damage is caused by the negligence of the trustee; and he has a lien on the property, or the proceeds of its sale, for such of the expenses of the bankruptcy as were incurred in connection with the seizure or disposal<sup>1</sup>.

<sup>1</sup> Insolvency Act 1986 s 304(3). The existence of reasonable grounds is ultimately a question of fact. The grounds on which the trustee acted should be sufficient to induce in a reasonable person the required belief:

see eg *McArdle v Egan* (1933) 150 LT 412; *Nakkuda Ali v Jayaratne* [1951] AC 66; *Registrar of Restrictive Trading Agreements v WH Smith & Son Ltd* [1969] 3 All ER 1065, [1969] 1 WLR 1460, CA; *IRC v Rossminster Ltd* [1980] AC 952, [1980] 1 All ER 80, HL.

As to the application of the Insolvency Act 1986 s 304 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 346 note 2 ante; and as to the transitional provisions which apply see para 346 note 2 ante.

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(iv) Liability of the Trustee/348. Power of court to set aside certain transactions.

#### 348. Power of court to set aside certain transactions.

If in the administration of the estate the trustee enters into any transaction with a person who is an associate<sup>1</sup> of his, the court may, on the application of any person interested<sup>2</sup>, set the transaction aside and order the trustee to compensate the estate for any loss suffered in consequence of it<sup>3</sup>.

The above provisions do not, however, apply if either the transaction was entered into with the prior consent of the court, or it is shown to the court's satisfaction that the transaction was for value, and that it was entered into by the trustee without knowing, or having any reason to suppose, that the person concerned was an associate<sup>4</sup>.

Nothing in the above provisions is to be taken as prejudicing the operation of any rule of law or equity with respect to a trustee's dealings with trust property, or the fiduciary obligations of any person<sup>5</sup>.

1 For the meaning of 'associate' see para 5 ante.

2 'Person interested' was considered in *Re Beesley (Audrey), ex p Beesley (Terence Jack) v Official Receiver* [1975] 1 All ER 385, [1975] 1 WLR 569, DC for the purposes of the Bankruptcy Act 1914 s 29 (repealed) as meaning a person with a proprietary or pecuniary interest; but a mere spouse was not a 'person interested'. See also *Stevens v Hutchinson* [1953] Ch 299, [1953] 1 All ER 699; *Re Roehampton Swimming Pool Ltd* [1968] 3 All ER 661, [1968] 1 WLR 1693.

3 Insolvency Rules 1986, SI 1986/1925, r 6.147(1).

4 Ibid r 6.147(2).

5 Ibid r 6.147(3). The trustee is not expressly precluded from purchasing property comprised in the bankrupt's estate; but he is subject to the general law applicable to the purchase of trust property by a trustee, that is to say that such a purchase is voidable at the instance of any beneficiary: see eg *Campbell v Walker* (1800) 5 Ves 678; and TRUSTS vol 48 (2007 Reissue) para 938 et seq.

## UPDATE

### 316-389 Trustee in bankruptcy



The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(iv) Liability of the Trustee/349. Rule against solicitation.

### **349. Rule against solicitation.**

Where the court is satisfied that any improper solicitation has been used by or on behalf of the trustee in obtaining proxies or procuring his appointment, it may order that no remuneration out of the estate is to be allowed to any person by whom, or on whose behalf, the solicitation was exercised<sup>1</sup>.

An order of the court under the above provisions overrides any resolution of the creditors' committee or the creditors, or any other provision in the Insolvency Rules 1986 relating to the trustee's remuneration<sup>2</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.148(1). As to proxies see para 278 et seq ante.

2 Ibid r 6.148(2). As to the trustee's remuneration see para 351 et seq post.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(iv) Liability of the Trustee/350. Enforcement of trustee's obligations to official receiver.

### **350. Enforcement of trustee's obligations to official receiver.**

On the application of the official receiver, the court may make such orders as it thinks necessary for enforcement of the trustee's statutory duty<sup>1</sup> to give information and assistance and to produce and allow inspection of books and records relating to the bankruptcy<sup>2</sup>. Such an order of the court may provide that all costs of and incidental to the official receiver's application are to be borne by the trustee<sup>3</sup>.

1 ie under the Insolvency Act 1986 s 305(3): see para 456 post.

2 Insolvency Rules 1986, SI 1986/1925, r 6.149(1).

3 Ibid r 6.149(2).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(v) Remuneration of the Trustee/351. Fixing of remuneration.

## (v) Remuneration of the Trustee

### 351. Fixing of remuneration.

The trustee is entitled to receive remuneration for his services as such; and the remuneration must be fixed either:

- 526 (1) as a percentage of the value of the assets in the bankrupt's estate which are realised or distributed, or of the one value and the other in combination; or
- 527 (2) by reference to the time properly given by the insolvency practitioner, as trustee, and his staff in attending to matters arising in the bankruptcy<sup>1</sup>.

Where the trustee is other than the official receiver, it is for the creditors' committee, if there is one, to determine whether his remuneration is to be fixed under head (1) or head (2) above and, if under head (1) above, to determine any percentage to be applied as there mentioned<sup>2</sup>.

In arriving at that determination, the committee must have regard to the following matters:

- 528 (a) the complexity, or otherwise, of the case;
- 529 (b) any respects in which, in connection with the administration of the estate, there falls on the insolvency practitioner, as trustee, any responsibility of an exceptional kind or degree;
- 530 (c) the effectiveness with which the insolvency practitioner appears to be carrying out, or to have carried out, his duties as trustee; and
- 531 (d) the value and nature of the assets in the estate with which the trustee has to deal<sup>3</sup>.

If there is no creditors' committee, or the committee does not make the requisite determination, the trustee's remuneration may be fixed, in accordance with heads (1) and (2) above, by a resolution of a meeting of creditors; and, in arriving at that determination, the creditors must have regard to the matters in heads (a) to (d) above<sup>4</sup>.

If not fixed as above, the trustee's remuneration must be on the scale laid down for the official receiver by general regulations<sup>5</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.138(1), (2). For the meaning of assets 'realised or distributed' see *Re a Debtor (No 29 of 1986)* [1997] BPIR 183, DC (a decision under the Bankruptcy Act 1914 s 82(1) (repealed)).

2 Insolvency Rules 1986, SI 1986/1925, r 6.138(3). As to the creditors' committee see para 328 et seq ante.

3 Ibid r 6.138(4).

4 Ibid r 6.138(5).

5 Ibid r 6.138(6). For these purposes, 'general regulations' means regulations made by the Secretary of State under r 12.1 (as amended) (see para 21 ante): rr 13.1, 13.13(5). As to the official receiver's remuneration see para 40 ante.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **351 Fixing of remuneration**

NOTE 5--SI 1986/1925 r 6.138(6) substituted, r 6.138A added: SI 2004/584.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(v) Remuneration of the Trustee/352. Other matters affecting remuneration.

### **352. Other matters affecting remuneration.**

Where the trustee sells assets on behalf of a secured creditor<sup>1</sup>, he is entitled to take for himself, out of the proceeds of sale, a sum by way of remuneration equivalent to the remuneration chargeable in corresponding circumstances by the official receiver under general regulations<sup>2</sup>.

Where there are joint trustees, it is for them to agree between themselves as to how the remuneration payable should be apportioned; and any dispute between them may be referred to the court for settlement by order, or to the creditors' committee or a meeting of creditors for settlement by resolution<sup>3</sup>.

If the trustee is a solicitor<sup>4</sup> and employs his own firm, or any partner in it, to act on behalf of the estate, profit costs may not be paid unless this is authorised by the creditors' committee, the creditors or the court<sup>5</sup>.

1 For the meaning of 'secured creditor' see para 560 post.

2 Insolvency Rules 1986, SI 1986/1925, r 6.139(1). For the meaning of 'general regulations' see para 351 note 5 ante. As to the official receiver's remuneration see para 40 ante.

3 Ibid r 6.139(2).

4 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

5 Insolvency Rules 1986, SI 1986/1925, r 6.139(3).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **352 Other matters affecting remuneration**

NOTE 2--SI 1986/1925 r 6.139(1) substituted: SI 2004/584.

NOTE 4--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(v) Remuneration of the Trustee/353. Recourse of trustee to meeting of creditors.

### **353. Recourse of trustee to meeting of creditors.**

If the trustee's remuneration has been fixed by the creditors' committee, and he considers the rate or amount to be insufficient, he may request that it be increased by resolution of the creditors<sup>1</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.140.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **353 Recourse of trustee to meeting of creditors**

TEXT AND NOTES--SI 1986/1925 r 6.140 substituted by r 6.140A: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(v) Remuneration of the Trustee/354. Recourse to the court.

### **354. Recourse to the court.**

If the trustee considers that the remuneration fixed for him by the creditors' committee, or by resolution of the creditors, or as on the scale laid down for the official receiver by general regulations<sup>1</sup>, is insufficient, he may apply to the court for an order increasing its amount or rate<sup>2</sup>.

The trustee must give at least 14 days' notice of his application to the members of the creditors' committee, and the committee may nominate one or more members to appear or be represented, and to be heard, on the application<sup>3</sup>.

If there is no creditors' committee, the trustee's notice of his application must be sent to such one or more of the bankrupt's creditors as the court may direct, which creditors may nominate one or more of their number to appear or be represented<sup>4</sup>.

If it appears to be a proper case, the court may order the costs of the trustee's application, including the costs of any member of the creditors' committee appearing or being represented on it, or any creditor so appearing or being represented, to be paid out of the estate<sup>5</sup>.

1 le under the Insolvency Rules 1986, SI 1986/1925, r 6.138(6): see para 351 ante.

2 Ibid r 6.141(1).

3 Ibid r 6.141(2).

4 Ibid r 6.141(3).

5 Ibid r 6.141(4) (amended by SI 1987/1919).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(v) Remuneration of the Trustee/355. Creditors' claim that remuneration is excessive.

#### 355. Creditors' claim that remuneration is excessive.

Any creditor of the bankrupt may, with the concurrence of at least 25 per cent in value of the creditors, including himself, apply to the court for an order that the trustee's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive<sup>1</sup>.

If the court thinks that no sufficient cause is shown for the application, it may dismiss it; but it may not do so unless the applicant has had an opportunity to attend the court for a hearing without notice being served on any other party, of which he has been given at least seven days' notice; and, if the application is not dismissed, the court must fix a venue<sup>2</sup> for it to be heard<sup>3</sup>.

At least 14 days before the hearing, the applicant must send to the trustee a notice stating the venue so fixed; and the notice must be accompanied by a copy of the application, and of any evidence which the applicant intends to adduce in support of it<sup>4</sup>. If the court considers the application to be well-founded, it must make an order fixing the remuneration at a reduced amount or rate<sup>5</sup>.

Unless the court orders otherwise, the costs of the application must be paid by the applicant, and do not fall on the estate<sup>6</sup>.

- 1 Insolvency Rules 1986, SI 1986/1925, r 6.142(1).
- 2 For the meaning of 'venue' see para 84 note 21 ante.
- 3 Insolvency Rules 1986, SI 1986/1925, r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 6.142(2).
- 4 Ibid r 6.142(3).
- 5 Ibid r 6.142(4).
- 6 Ibid r 6.142(5).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 355 Creditors' claim that remuneration is excessive

TEXT AND NOTES--See SI 1986/1925 r 6.126A (resignation (application under r 6.142)), r 6.142A (review of remuneration), r 6.142B (remuneration of new trustee), r 6.142C (apportionment of set fee remuneration) (added by SI 2010/686).

NOTE 3--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/356. Resignation of trustee.

## (vi) Resignation, Removal or Vacancy in the Office of Trustee

### 356. Resignation of trustee.

In the prescribed circumstances, the trustee may resign his office by giving notice of his resignation to the court<sup>1</sup>.

<sup>1</sup> Insolvency Act 1986 s 298(7). See further para 357 et seq post. As to the application of s 298 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

As to the modification of s 298 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1280.

As to the circumstances in which the court may make orders for the removal and replacement of trustees in multiple cases rather than following the resignation procedure see *Re Sankey Furniture Ltd, ex p Harding, Re Calorifique Ltd, ex p Betts* [1995] 2 BCLC 594; *Re Equity Nominees Ltd* [1999] 2 BCLC 19, [2000] BCC 84; and para 361 post. As to the procedure in such cases see para 80 ante.

**UPDATE****316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

**356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/357. Creditors' meeting to receive trustee's resignation.

**357. Creditors' meeting to receive trustee's resignation.**

Before resigning his office, the trustee must call a meeting of creditors for the purpose of receiving his resignation; and notice of the meeting must be sent to the official receiver at the same time as it is sent to creditors<sup>1</sup>. The notice to creditors must be accompanied by an account of the trustee's administration of the bankrupt's estate including a summary of his receipts and payments, and a statement by him that he has reconciled his account with that which is held by the Secretary of State in respect of the bankruptcy<sup>2</sup>.

The trustee may only proceed under these provisions on grounds of ill health or because he intends ceasing to be in practice as an insolvency practitioner, or there is some conflict of interest or change of personal circumstances which precludes or makes impracticable the further discharge by him of the duties of trustee<sup>3</sup>.

Where, however, two or more persons are acting as trustee jointly, any one of them may proceed under these provisions, without prejudice to the continuation in office of the other or others, on the ground that, in his opinion and that of the others, it is no longer expedient that there should continue to be the present number of joint trustees<sup>4</sup>.

If there is no quorum present at the meeting summoned to receive the trustee's resignation, the meeting is deemed to have been held, a resolution is deemed passed that the trustee's resignation be accepted and the creditors are deemed not to have resolved against the trustee having his release<sup>5</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.126(1).

2 Ibid r 6.126(2). As to the account held by the Secretary of State see para 26 ante.

3 Ibid r 6.126(3).

4 Ibid r 6.126(4).

5 Ibid r 6.126(5) (added by SI 1987/1919). Where the Insolvency Rules 1986, SI 1986/1925, r 6.126(5) (as so added) applies, any reference in the Insolvency Rules 1986, SI 1986/1925 (as amended) to a resolution that the trustee's resignation be accepted is replaced by a reference to the making of a written statement, signed by the person who, had there been a quorum present, would have been chairman of the meeting, that no quorum was

present and that the trustee may sign: r 6.126(6) (added by SI 1987/1919). As to the quorum at creditors' meetings see para 287 ante.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

### **357 Creditors' meeting to receive trustee's resignation**

TEXT AND NOTES--See SI 1986/1925 r 6.78D (distribution of property in specie), r 6.126A (resignation (application under r 6.142)) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/358. Action to follow acceptance of resignation.

### **358. Action to follow acceptance of resignation.**

Where a meeting of creditors is summoned for the purpose of receiving the trustee's resignation, the notice summoning it must indicate that this is the purpose, or one of the purposes, of the meeting, and the notice must draw the attention of creditors to the statutory provisions<sup>1</sup> with respect to the trustee's release<sup>2</sup>. A copy of the notice must at the same time also be sent to the official receiver<sup>3</sup>.

Where the chairman of the meeting is other than the official receiver, and there is passed at the meeting any of the following resolutions:

- 532 (1) that the trustee's resignation be accepted;
- 533 (2) that a new trustee be appointed;
- 534 (3) that the resigning trustee be not given his release,

the chairman must, within three days, send to the official receiver a copy of the resolution<sup>4</sup>.

If it has been resolved to accept the trustee's resignation, the chairman must send to the official receiver a certificate to that effect<sup>5</sup>.

If the creditors have resolved to appoint a new trustee, the certificate of his appointment must also be sent to the official receiver within that time; and the statutory provisions applicable where a trustee has been appointed trustee by a creditors' meeting<sup>6</sup> must be complied with in respect of it<sup>7</sup>. If the trustee's resignation is accepted, the notice of it<sup>8</sup> must be given by him forthwith after the meeting; and he must send a copy of the notice to the official receiver<sup>9</sup>. The notice must be accompanied by a copy of the account sent to creditors<sup>10</sup>; and the official



receiver must file a copy of the notice in court<sup>11</sup>. The trustee's resignation is effective as from the date on which the official receiver files the copy notice in court, that date to be indorsed on the copy notice<sup>12</sup>.

- 1 le the Insolvency Rules 1986, SI 1986/1925, r 6.135: see para 376 post.
- 2 Ibid r 6.127(1). For the prescribed form of notice to creditors see rr 6.127, 12.7(1), (2), Sch 4, Form 6.35.
- 3 Ibid r 6.127(2).
- 4 Ibid r 6.127(3).
- 5 Ibid r 6.127(3). For the prescribed form of certificate see rr 6.127, 12.7(1), (2), Sch 4, Form 6.44.
- 6 le ibid r 6.120 (as amended): see para 320 ante.
- 7 Ibid r 6.127(4).
- 8 le the notice required by the Insolvency Act 1986 s 298(7): see para 356 ante.
- 9 Insolvency Rules 1986, SI 1986/1925, r 6.127(5).
- 10 le the account sent to creditors under ibid r 6.126(2): see para 357 ante.
- 11 Ibid r 6.127(6). For the meaning of 'file in court' see para 95 note 10 ante.
- 12 Ibid r 6.127(7).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in **PARA 2 NOTE 5**.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

### **358 Action to follow acceptance of resignation**

**NOTE 2**--See *Customs and Excise Comrs v Allen* (2003) Times, 20 March.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/359. Permission to resign granted by the court.

### **359. Permission to resign granted by the court.**

If at a creditors' meeting summoned to accept the trustee's resignation it is resolved that it be not accepted, the court may, on the trustee's application, make an order giving him permission to resign<sup>1</sup>.

The court's order may include such provision as it thinks fit with respect to matters arising in connection with the resignation, and must determine the date from which the trustee's release is effective<sup>2</sup>.

The court must send two sealed copies of the order to the trustee, who must send one of the copies forthwith to the official receiver<sup>3</sup>. On sending notice of his resignation to the court<sup>4</sup>, the trustee must send a copy of it to the official receiver<sup>5</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.128(1). For the prescribed form of order see rr 6.128, 12.7(1), (2), Sch 4, Form 6.45.

2 Ibid r 6.128(2).

3 Ibid r 6.128(3).

4 As required by the Insolvency Act 1986 s 298(7): see para 356 ante. For the prescribed form of notice see the Insolvency Rules 1986, SI 1986/1925, rr 6.128, 12.7(1), (2), Sch 4, Form 6.46.

5 Ibid r 6.128(4).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

### **359 Permission to resign granted by the court**

NOTE 1--SI 1986/1925 Form 6.45 substituted: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/360. Advertisement of resignation.

### **360. Advertisement of resignation.**

Where a new trustee is appointed in place of one who has resigned, the new trustee must, in the advertisement of his appointment, state that his predecessor has resigned and, if it be the case, that he has been given his release<sup>1</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.134.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

### **360 Advertisement of resignation**

TEXT AND NOTES--SI 1986/1925 r 6.134 amended: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/361. Removal of trustee; in general.

### **361. Removal of trustee; in general.**

The trustee of a bankrupt's estate may be removed from office only by an order of the court or by a general meeting of the bankrupt's creditors summoned specially for that purpose in accordance with the Insolvency Rules 1986<sup>1</sup>. However, where<sup>2</sup> the official receiver is trustee on a criminal bankruptcy order being made against an individual, he may not be so removed from office<sup>3</sup>.

A general meeting of the bankrupt's creditors may not be held for the purpose of removing the trustee at any time when<sup>4</sup> a certificate for the summary administration of the estate is in force<sup>5</sup>.

Where the official receiver is trustee<sup>6</sup>, or a trustee is appointed by the Secretary of State or<sup>7</sup> by the court, a general meeting of the bankrupt's creditors must be summoned for the purpose of replacing the trustee only if:

- 535 (1) the trustee thinks fit; or
- 536 (2) the court so directs; or
- 537 (3) the meeting is requested by one of the bankrupt's creditors with the concurrence of not less than one-quarter, in value, of the creditors, including the creditor making the request<sup>8</sup>.

1 Insolvency Act 1986 s 298(1). See further para 362 et seq post. As to the application of s 298 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

As to the modification of s 298 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1280.

For an instance where the court exercised its power to remove see *Re Sankey Furniture Ltd, ex p Harding, Re Calorifique Ltd, ex p Betts* [1995] 2 BCLC 594 (retirement on grounds of ill health). See also *Re Keypak Homecare Ltd* [1987] BCLC 409, 3 BCC 558 (liquidator acted totally unreasonably in assigning a right of action by the company to a purchaser without attempting to realise the best price); *Re AJ Adams (Builders) Ltd, Re Autonational Extended Warranties Ltd* [1991] BCLC 359, [1991] BCC 62 (disqualification on loss of insolvency practitioner's licence); *Re Edennote Ltd, Tottenham Hotspur plc v Ryman* [1995] 2 BCLC 248, [1995] BCC 389 (court will not lightly remove its own officer and will have regard to the impact of removal on his professional standing and reputation) (all company cases decided under the Insolvency Act 1986 s 172).

As to the orders a court may make on removal see *Supperstone v Auger* [1999] BPIR 152 (court has jurisdiction to make block orders replacing an insolvency practitioner in all appointments regardless of whether the court is seised of all the insolvencies); *Clements v Udal* [2001] BPIR 454 (court has power to appoint additional or replacement office-holders on a temporary basis); *Re Equity Nominees Ltd* [1999] 2 BCLC 19, [2000] BCC 84 (replacements appointed where meetings of creditors and contributories would serve no useful purpose). As to the procedure where an insolvency practitioner holds office in more than one case see para 80 ante.

2    Ie by virtue of the Insolvency Act 1986 s 297(1): see para 323 ante. As to the prospective repeal of s 297(1) see para 844 note 2 post.

3    Ibid s 298(2).

4    Ie under ibid s 275: see para 206 et seq ante.

5    Ibid s 298(3).

6    Ie by virtue of ibid s 293(3) (see para 323 ante) or s 295(4) (see para 321 ante).

7    Ie otherwise than under ibid s 297(5): see para 322 ante.

8    Ibid s 298(4).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 356-374 Resignation, removal or vacancy in the office of trustee

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

### 361 Removal of trustee; in general

NOTE 1--See also *Donaldson v O'Sullivan (Official Receiver intervening)* [2008] EWCA Civ 879, [2009] 1 All ER 1087.

TEXT AND NOTES 4, 5--Repealed: Enterprise Act 2002 Sch 23 para 10, Sch 26.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/362. Meeting of creditors to remove trustee.

### 362. Meeting of creditors to remove trustee.

Where a meeting of creditors is summoned for the purpose of removing the trustee, the notice summoning it must indicate that this is the purpose, or one of the purposes, of the meeting, and the notice must draw the attention of creditors to the statutory provisions<sup>1</sup> with respect to the trustee's release<sup>2</sup>. A copy of the notice must at the same time also be sent to the official receiver<sup>3</sup>.

At the meeting, a person other than the trustee or his nominee may be elected as chairman; but, if the trustee or his nominee is chairman and a resolution has been proposed for the trustee's removal, the chairman may not adjourn the meeting without the consent of at least one-half, in value, of the creditors present, in person or by proxy, and entitled to vote<sup>4</sup>.

Where the chairman of the meeting is other than the official receiver, and there is passed at the meeting any of the following resolutions:

- 538 (1) that the trustee be removed;
- 539 (2) that a new trustee be appointed;
- 540 (3) that the removed trustee be not given his release,

the chairman must, within three days, send to the official receiver a copy of the resolution<sup>5</sup>. If it has been resolved to remove the trustee, the chairman must send to the official receiver a certificate to that effect<sup>6</sup>.

If the creditors have resolved to appoint a new trustee, the certificate of his appointment must also be sent to the official receiver within that time; and the statutory provisions applicable where a trustee has been appointed by a creditors' meeting<sup>7</sup> must be complied with in respect of it<sup>8</sup>.

1 le the Insolvency Act 1986 s 299(3): see para 376 post.

2 Insolvency Rules 1986, 1986/1925, r 6.129(1). For the prescribed form of notice see rr 6.129, 12.7(1), (2), Sch 4, Form 6.35.

3 Ibid r 6.129(2).

4 Ibid r 6.129(3).

5 Ibid r 6.129(4).

6 Ibid r 6.129(4). For the prescribed form of certificate see rr 6.129, 12.7(1), (2), Sch 4, Form 6.47.

7 le ibid r 6.120 (as amended): see para 320 ante.

8 Ibid r 6.129(5).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/363. Court's power to regulate meeting.

### **363. Court's power to regulate meeting.**

Where a meeting<sup>1</sup> of creditors to remove the trustee is to be held, or is proposed to be summoned, the court may, on the application of any creditor, give directions as to the mode of summoning it, the sending out and return of forms of proxy, the conduct of the meeting, and any other matter which appears to the court to require regulation or control<sup>2</sup>.

<sup>1</sup> See under the Insolvency Rules 1986, SI 1986/1925, r 6.129: see para 362 ante.

<sup>2</sup> Ibid r 6.130.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/364. Procedure on removal.

### **364. Procedure on removal.**

Where the creditors have resolved that the trustee be removed, the official receiver must file the certificate of removal in court<sup>1</sup>. The resolution is effective as from the date on which the official receiver files the certificate of removal in court, and that date must be indorsed on the certificate<sup>2</sup>. A copy of the certificate, so indorsed, must be sent by the official receiver to the trustee who has been removed and, if a new trustee has been appointed, to him<sup>3</sup>.

The official receiver may not file the certificate in court until the Secretary of State has certified to him that the removed trustee has reconciled his account with that held by the Secretary of State in respect of the bankruptcy<sup>4</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.131(1). For the meaning of 'file in court' see para 95 note 10 ante.

- 2 Ibid r 6.131(2).
- 3 Ibid r 6.131(3).
- 4 Ibid r 6.131(4). As to the account held by the Secretary of State see para 26 ante.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/365. Advertisement of removal.

### **365. Advertisement of removal.**

Where a new trustee is appointed in place of one who has been removed, the new trustee must, in the advertisement of his appointment, state that his predecessor has been removed and, if it be the case, that he has been given his release<sup>1</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.134.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

### **365 Advertisement of removal**

TEXT AND NOTES--SI 1986/1925 r 6.134 amended: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/366. Removal of trustee by the court.

### **366. Removal of trustee by the court.**

Where application is made to the court for the removal of the trustee, or for an order directing the trustee to summon a meeting of creditors for the purpose of removing him, the court may, if it thinks that no sufficient cause is shown for the application, dismiss it; but it may not do so unless the applicant has had an opportunity to attend the court for a hearing without notice being served on any other party, of which he has been given at least seven days' notice<sup>1</sup>. If the application is not so dismissed, the court must fix a venue<sup>2</sup> for it to be heard<sup>3</sup>. At least 14 days before the hearing, the applicant must send to the trustee and the official receiver notice stating the venue so fixed; and the notice must be accompanied by a copy of the application, and of any evidence which the applicant intends to adduce in support of it<sup>4</sup>.

Subject to any contrary order of the court, the costs of the application do not fall on the estate<sup>5</sup>.

Where the court removes the trustee:

- 541 (1) it must send copies of the order of removal to him and to the official receiver;
- 542 (2) the order may include such provision as the court thinks fit with respect to the matters arising in connection with the removal; and
- 543 (3) if the court appoints a new trustee, the statutory provisions relating to the appointment of a trustee by the court<sup>6</sup> apply<sup>7</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 6.132(1), (2). For the prescribed form of order see rr 6.132, 12.7(1), (2), Sch 4, Form 6.48.

2 For the meaning of 'venue' see para 84 note 21 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.132(1), (2).

4 Ibid r 6.132(1), (3).

5 Ibid r 6.132(1), (4).

6 Ie ibid r 6.121: see para 322 ante.

7 Ibid r 6.132(1), (5).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).



### **366 Removal of trustee by the court**

NOTE 1--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/367. Removal of trustee by Secretary of State.

### **367. Removal of trustee by Secretary of State.**

If the trustee was appointed by the Secretary of State, he may be removed by a direction of the Secretary of State<sup>1</sup>.

If the Secretary of State decides to remove the trustee, he must, before doing so, notify the trustee and the official receiver of his decision and the grounds of it, and specify a period within which the trustee may make representations against implementation of the decision<sup>2</sup>.

If the Secretary of State directs the removal of the trustee, he must forthwith file notice of his decision in court<sup>3</sup>, and send notice to the trustee and the official receiver<sup>4</sup>. If the trustee is removed by direction of the Secretary of State, the court may make any such order in his case as it would have power to make if he had been removed by itself<sup>5</sup>.

1 Insolvency Act 1986 s 298(5). As to the application of s 298 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.133(1).

3 For the meaning of 'file in court' see para 95 note 10 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.133(2).

5 Ibid r 6.133(3).

### **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN

BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/368. Vacancy in office of trustee.

### **368. Vacancy in office of trustee.**

Where the appointment of a person as trustee of a bankrupt's estate fails to take effect or, such an appointment having taken effect, there is otherwise a vacancy<sup>1</sup> in the office of trustee, the official receiver is trustee until the vacancy is filled<sup>2</sup>.

The official receiver may summon a general meeting of the bankrupt's creditors for the purpose of filling the vacancy and must summon such a meeting if required to do so<sup>3</sup> on a creditors' requisition<sup>4</sup>.

If at the end of the period of 28 days beginning with the day on which the vacancy first came to the official receiver's attention he has not summoned, and is not proposing to summon, a general meeting of creditors for the purpose of filling the vacancy, he must refer the need for an appointment to the Secretary of State<sup>5</sup>.

Where a certificate for the summary administration of the estate is for the time being in force<sup>6</sup>, the official receiver may refer the need to fill any vacancy to the court or, if the vacancy arises because a person appointed by the Secretary of State has ceased to hold office, to the court or the Secretary of State, and the above provisions<sup>7</sup> relating to the official receiver's power or duty to summon a general meeting of the bankrupt's creditors and his referring the need for an appointment to the Secretary of State do not apply<sup>8</sup>. On such a reference the Secretary of State must either make an appointment or decline to make one<sup>9</sup>; and, if on a reference to the Secretary of State no appointment is made, the official receiver continues to be trustee of the bankrupt's estate, but without prejudice to his power to make a further reference<sup>10</sup>.

1 For these purposes, references to a vacancy include a case where it is necessary, in relation to any property which is or may be comprised in a bankrupt's estate, to revive the trusteeship of that estate after the holding of a final meeting summoned under the Insolvency Act 1986 s 331 (see para 606 post) or the giving by the official receiver of notice under s 299(2) (see para 377 post): s 300(1), (8). As to the procedure for the replacement of an outgoing insolvency practitioner see para 80 ante.

As to the application of s 300 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

2 Ibid s 300(1), (2). As to the modification of the Insolvency Act 1986 s 300 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1282.

3 Ie in pursuance of the Insolvency Act 1986 s 314(7): see para 463 post.

4 Ibid s 300(1), (3).

5 Ibid s 300(1), (4).

6 See para 206 et seq ante.

7 Ie the Insolvency Act 1986 s 300(3), (4): see supra.

8 Ibid s 300(1), (5).

9 Ibid s 300(1), (6).

10 Ibid s 300(1), (7).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

### **368 Vacancy in office of trustee**

TEXT AND NOTES 6-8--Insolvency Act 1986 s 300(5) repealed: Enterprise Act 2002 Sch 23 para 11(a), Sch 26.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/369. Loss of qualification as insolvency practitioner.

### **369. Loss of qualification as insolvency practitioner.**

The trustee, not being the official receiver, must vacate office if he ceases to be a person who is for the time being qualified to act as an insolvency practitioner in relation to the bankrupt<sup>1</sup>. Where the trustee so vacates office, he must forthwith give notice of his doing so to the official receiver, who must give notice to the Secretary of State<sup>2</sup>; and the official receiver must file in court<sup>3</sup> a copy of his notice<sup>4</sup>.

1 Insolvency Act 1986 s 298(6). As to insolvency practitioners and their qualification see para 42 et seq ante. As to the application of s 298 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.144(1), (2). For the prescribed form of notice see rr 6.144, 12.7(1), (2), Sch 4, Form 6.51. Rule 6.135 (see para 376 post) applies as regards the trustee obtaining his release, as if he had been removed by the court: r 6.144(1), (3).

3 For the meaning of 'file in court' see para 95 note 10 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.144(1), (2).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/370. Final meeting.

### **370. Final meeting.**

The trustee must vacate office on giving notice to the court that a final meeting has been held<sup>1</sup> and of the decision, if any, of that meeting<sup>2</sup>.

1 le under the Insolvency Act 1986 s 331: see para 606 post.

2 Ibid s 298(8). As to the transitional provisions which apply see para 346 note 2 ante.

#### **UPDATE**

#### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/371. Annulment of bankruptcy order.

### **371. Annulment of bankruptcy order.**

The trustee must vacate office if the bankruptcy order is annulled<sup>1</sup>.

1 Insolvency Act 1986 s 298(9). As to the annulment of bankruptcy orders see para 610 et seq post.

#### **UPDATE**

#### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/372. Death of trustee.

### **372. Death of trustee.**

Where the trustee, other than the official receiver, has died, it is the duty of his personal representatives to give notice of the fact to the official receiver, specifying the date of the death<sup>1</sup>. This provision does not, however, apply if notice has been given under any of the following provisions<sup>1</sup>.

If the deceased trustee was a partner in a firm, notice may be given to the official receiver by a partner in the firm who is qualified to act as an insolvency practitioner<sup>2</sup>, or is a member of any body recognised by the Secretary of State<sup>3</sup> for the authorisation of insolvency practitioners<sup>4</sup>.

Notice of the death may be given by any person producing to the official receiver the relevant death certificate or a copy of it<sup>5</sup>.

The official receiver must give notice to the court, for the purpose of fixing the date of the deceased trustee's release<sup>6</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.143(1). As to the procedure for the replacement of an outgoing insolvency practitioner see para 80 ante.

2 As to insolvency practitioners and their qualification see para 42 et seq ante.

3 As to the bodies recognised by the Secretary of State see para 48 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.143(2).

5 Ibid r 6.143(3).

6 Ibid r 6.143(4). The date of the trustee's release is fixed in accordance with the Insolvency Act 1986 s 299(3)(a): see para 376 head (1) post.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/373. Notice to official receiver of intention to vacate office.

### **373. Notice to official receiver of intention to vacate office.**

Where the trustee intends to vacate office, whether by resignation or otherwise, he must give notice of his intention to the official receiver together with notice of any creditors' meeting to be held in respect of his vacation of office, including any meeting to receive his resignation<sup>1</sup>; and the notice to the official receiver must be given at least 21 days before any such creditors' meeting<sup>2</sup>.

Where there remains in the bankrupt's estate any property which has not been realised, applied, distributed or otherwise fully dealt with in the bankruptcy, the trustee must include in his notice to the official receiver details of the nature of that property, its value, or the fact that it has no value, its location, any action taken by the trustee to deal with that property or any reason for his not dealing with it, and the current position in relation to it<sup>3</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.145(1) (substituted by SI 1987/1919).

2 Insolventcy Rules 1986, SI 1986/1925, r 6.145(2) (substituted by SI 1987/1919).

3 Insolventcy Rules 1986, SI 1986/1925, r 6.145(3) (added by SI 1987/1919).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolventcy practitioner has died etc) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vi) Resignation, Removal or Vacancy in the Office of Trustee/374. Trustee's duties on vacating office.

### **374. Trustee's duties on vacating office.**

Where the trustee ceases to be in office as such, in consequence of removal<sup>1</sup>, resignation<sup>2</sup> or cesser of qualification as an insolventcy practitioner<sup>3</sup>, he is under obligation forthwith to deliver up to the person succeeding him as trustee the assets of the estate, after deduction of any expenses properly incurred, and distributions made, by him, and further to deliver up to that person:

- 544 (1) the records of the bankruptcy, including correspondence, proofs and other related papers appertaining to the bankruptcy while it was within his responsibility; and  
 545 (2) the bankrupt's books, papers and other records<sup>4</sup>.

When the administration of the bankrupt's estate is for practical purposes complete, the trustee must forthwith file in court<sup>5</sup> all proofs remaining with him in the proceedings<sup>6</sup>.

- 1 See para 361 et seq ante.  
 2 See para 356 et seq ante.  
 3 See para 369 ante.  
 4 Insolvency Rules 1986, SI 1986/1925, r 6.146(1).  
 5 For the meaning of 'file in court' see para 95 note 10 ante.  
 6 Insolvency Rules 1986, SI 1986/1925, r 6.146(2).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **356-374 Resignation, removal or vacancy in the office of trustee**

See SI 1986/1925 Pt 7 Ch 1A (rr 7.10A-7.10D) (block transfer of cases where insolvency practitioner has died etc) (added by SI 2010/686).

### **374 Trustee's duties on vacating office**

TEXT AND NOTES 5, 6--SI 1986/1925 r 6.146(2) revoked: SI 2004/584.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vii) Release of Trustee/A. IN THE COURSE OF ADMINISTRATION/375. Release of official receiver.

## **(vii) Release of Trustee**

### **A. IN THE COURSE OF ADMINISTRATION**

#### **375. Release of official receiver.**

Where the official receiver has ceased to be the trustee of a bankrupt's estate and a person is appointed in his stead, the official receiver has his release with effect from the following time, that is to say:

- 546 (1) where that person is appointed by a general meeting of the bankrupt's creditors or by the Secretary of State, the time at which the official receiver gives notice to the court that he has been replaced; and
- 547 (2) where that person is appointed by the court, such time as the court may determine<sup>1</sup>.

<sup>1</sup> Insolvency Act 1986 s 299(1). Where the official receiver or the trustee has his release under s 299, he is, with effect from the time specified in s 299(1)-(4) (see *supra*; and paras 376, 377 post), discharged from all liability both in respect of acts or omissions of his in the administration of the estate and otherwise in relation to his conduct as trustee; but nothing in s 299 prevents the exercise, in relation to a person who has had his release under s 299, of the court's powers under s 304 (see paras 346, 347 ante): s 299(5).

As to the application of s 299 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vii) Release of Trustee/A. IN THE COURSE OF ADMINISTRATION/376. Release of resigning or removed trustee.

### 376. Release of resigning or removed trustee.

A person other than the official receiver who has ceased to be the trustee has his release with effect from the following time, that is to say:

- 548 (1) in the case of a person who has been removed from office by a general meeting of the bankrupt's creditors that has not resolved against his release or who has died, the time at which notice is given to the court that that person has ceased to hold office<sup>1</sup>;
- 549 (2) in the case of a person who has been removed from office by a general meeting of the bankrupt's creditors that has resolved against his release, or by the court, or by the Secretary of State, or who has vacated office on ceasing to be qualified to act as an insolvency practitioner in relation to the bankrupt<sup>2</sup>, such time as the Secretary of State may, on application by that person, determine<sup>3</sup>;
- 550 (3) in the case of a person who has resigned, from when his resignation is effective<sup>4</sup>.

<sup>1</sup> Insolvency Act 1986 s 299(3)(a); Insolvency Rules 1986, SI 1986/1925, r 6.135(1). Where the trustee is removed by a meeting of creditors which has not resolved against his release, the fact of his release must be stated in the certificate of removal: r 6.135(2). See also para 375 note 1 ante. As to the application of the Insolvency Act 1986 s 299 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.



As to the modification of s 299 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1281.

2 le under the Insolvency Act 1986 s 298(6): see para 369 ante.

3 Ibid s 299(3)(b). Where the trustee is removed by a creditors' meeting which has resolved against his release or is removed by the court, he must apply to the Secretary of State for his release: Insolvency Rules 1986, SI 1986/1925, r 6.135(3)(b). When the Secretary of State gives the release, he must certify it accordingly, and must send the certificate to the official receiver to be filed in court: r 6.135(4). A copy of the certificate must be sent by the Secretary of State to the former trustee, whose release is effective from the date of the certificate: r 6.135(5). For the prescribed form of application to the Secretary of State see rr 6.135, 12.7(1), (2), Sch 4, Form 6.49. For the meaning of 'file in court' see para 95 note 10 ante.

4 Insolvency Act 1986 s 299(3)(c). In the case of a person adjudged bankrupt before 29 December 1986 (see para 2 ante), or adjudged bankrupt on or after that day on a petition presented before that day, s 299(5) (see para 375 note 1 ante) has effect for the purposes of s 299(3)(c) as it has for the purposes of s 299: s 437, Sch 11 para 14(1), (4).

Where the trustee resigns and the creditors' meeting called to receive his resignation has resolved against his release, he must apply to the Secretary of State for his release: Insolvency Rules 1986, SI 1986/1925, r 6.135(3)(a). When the Secretary of State gives the release, he must certify it accordingly, and must send the certificate to the official receiver to be filed in court: r 6.135(4). A copy of the certificate must be sent by the Secretary of State to the former trustee, whose release is effective from the date of the certificate: r 6.135(5).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vii) Release of Trustee/B. ON COMPLETION OF ADMINISTRATION/377. Release of official receiver.

## ***B. ON COMPLETION OF ADMINISTRATION***

### **377. Release of official receiver.**

If the official receiver, while he is the trustee, gives notice to the Secretary of State that the administration of the bankrupt's estate<sup>1</sup> is for practical purposes complete, he has his release with effect from such time as the Secretary of State may determine<sup>2</sup>. However, before so giving notice to the Secretary of State, the official receiver must send out notice of his intention to do so to all creditors who have proved their debts, and to the bankrupt<sup>3</sup>. The notice in each case must be accompanied by a summary of the official receiver's receipts and payments as trustee<sup>4</sup>.

When the Secretary of State has determined the date from which the official receiver is to have his release, he must give notice to the court that he has done so; and the notice must be accompanied by the summary of the official receiver's receipts and payments as trustee<sup>5</sup>.

1 le in accordance with the Insolvency Act 1986 Pt IX Ch IV (ss 305-335) (as amended).

2 Ibid s 299(2). See also para 375 note 1 ante. As to the application of s 299 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.136(1).

4 Ibid r 6.136(2).

5 Ibid r 6.136(3).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 377 Release of official receiver

NOTE 3--SI 1986/1925 r 6.136(1) amended: SI 2004/584.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vii) Release of Trustee/B. ON COMPLETION OF ADMINISTRATION/378. Final meeting of creditors.

### 378. Final meeting of creditors.

Where the trustee is other than the official receiver, he must give at least 28 days' notice of the final meeting of creditors<sup>1</sup>; and the notice must be sent to all creditors who have proved their debts, and to the bankrupt<sup>2</sup>. The trustee's report laid before the meeting must include a summary of his receipts and payments, and a statement by him that he has reconciled his account with that which is held by the Secretary of State in respect of the bankruptcy<sup>3</sup>.

At the final meeting, the creditors may question the trustee with respect to any matter contained in his report, and may resolve against his having his release<sup>4</sup>.

The trustee must give notice to the court that the final meeting has been held; and the notice must state whether or not he has been given his release, and must be accompanied by a copy of the report laid before the final meeting; and a copy of the notice must be sent by the trustee to the official receiver<sup>5</sup>.

If there is no quorum present at the final meeting, the trustee must report to the court that a final meeting was duly summoned<sup>6</sup>, but there was no quorum present; and the final meeting is then deemed to have been held, and the creditors not to have resolved against the trustee having his release<sup>7</sup>.

If the creditors at the final meeting have not so resolved, the trustee is released when the notice to the court that the final meeting has been held<sup>8</sup> is filed in court<sup>9</sup>; and, if they have so resolved, the trustee must obtain his release from the Secretary of State<sup>10</sup>.

1 Ie the meeting to be held under the Insolvency Act 1986 s 331: see para 606 post.

2 Insolvency Rules 1986, SI 1986/1925, r 6.137(1).

- 3 Ibid r 6.137(2). As to the account held by the Secretary of State see para 26 ante.
- 4 Ibid r 6.137(3).
- 5 Ibid r 6.137(4). For the prescribed form of notice to the court of the final meeting of creditors see rr 6.137, 12.7(1), (2), Sch 4, Form 6.50.
- 6 le in accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended).
- 7 Ibid r 6.137(5); Insolvency Act 1986 s 299(3)(d)(ii). As to the quorum at creditors' meetings see para 287 ante.
- 8 le the notice under the Insolvency Rules 1986, SI 1986/1925, r 6.137(4): see supra.
- 9 For the meaning of 'file in court' see para 95 note 10 ante.
- 10 Insolvency Rules 1986, SI 1986/1925, r 6.137(6); Insolvency Act 1986 s 299(3)(d)(i). The release is obtained from the Secretary of State as provided by the Insolvency Rules 1986, SI 1986/1925, r 6.135 (see para 376 ante): r 6.137(6).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in **PARA 2 NOTE 5**.

### **378 Final meeting of creditors**

NOTE 2--SI 1986/1925 r 6.137(1) amended, r 6.137A added: SI 2004/584. See SI 1986/1925 r 6.78D (distribution of property in specie) (added by SI 2010/686).

TEXT AND NOTE 4--For 'official receiver' read 'Secretary of State': SI 1986/1925 r 6.137(4) (amended by SI 1986/1925).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(vii) Release of Trustee/C. ON ANNULMENT OF BANKRUPTCY ORDER/379. Release on annulment of bankruptcy order.

## ***C. ON ANNULMENT OF BANKRUPTCY ORDER***

### **379. Release on annulment of bankruptcy order.**

Where a bankruptcy order is annulled<sup>1</sup>, the trustee at the time of the annulment has his release with effect from such time as the court may determine<sup>2</sup>.

1 As to annulment of bankruptcy orders see para 610 et seq post.

2 Insolvency Act 1986 s 299(4). See also para 375 note 1 ante. As to application of s 299 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 265 note 3 ante.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(viii) Books, Accounts and Audit/380. Duty to keep financial records; retention and delivery of records.

#### **(viii) Books, Accounts and Audit**

##### **380. Duty to keep financial records; retention and delivery of records.**

The trustee<sup>1</sup> must prepare and keep:

- 551 (1) separate financial records in respect of each bankrupt; and
- 552 (2) such other financial records as are required to explain the receipts and payments entered in the records described in head (1) above or in the records kept where the trustee carries on any business of the bankrupt<sup>2</sup>;

and he must, subject to the provisions as to trading accounts<sup>3</sup>, from day to day enter in those records all the receipts and payments made by him<sup>4</sup>.

The trustee must obtain and keep bank statements relating to any local bank account<sup>5</sup> in the name of the bankrupt<sup>6</sup>. The trustee must submit the financial records to the creditors' committee when required for inspection<sup>7</sup>; and, if the committee is not satisfied with the contents of the financial records so submitted, it may so inform the Secretary of State, giving the reasons for its dissatisfaction, and the Secretary of State may take such action as he thinks fit<sup>8</sup>.

All records kept by the trustee<sup>9</sup> and any such records received by him from a predecessor in that office must be retained by him for a period of six years following his vacation of that office or, in the case of the official receiver, his release as trustee<sup>10</sup>, unless he delivers them to another trustee who succeeds him in office<sup>11</sup>. Where the trustee is succeeded in office by another trustee, all such records must be delivered to that successor forthwith, unless the bankruptcy is for practical purposes complete and the successor is the official receiver, in which case the records are only to be delivered to the official receiver if the latter so requests<sup>12</sup>.

1 For the meaning of 'trustee' see para 28 note 2 ante.

2 Ie under the Insolvency Regulations 1994, SI 1994/2507, reg 26: see para 381 post.

3 Ie subject to ibid reg 26.

4 Ibid reg 24(1).

5 For the meaning of 'local bank' and 'local bank account' see para 388 note 2 post.

6 Insolvency Regulations 1994, SI 1994/2507, reg 24(2).

7 Ibid reg 24(3).

- 8 Ibid reg 24(4).
- 9 Ie under regs 24, 26.
- 10 Ie under the Insolvency Act 1986 s 299: see paras 375, 377 ante.
- 11 Insolvency Regulations 1994, SI 1994/2507, reg 27(1).
- 12 Ibid reg 27(2).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(viii) Books, Accounts and Audit/381. Carrying on business.

#### 381. Carrying on business.

Where the trustee<sup>1</sup> carries on any business of the bankrupt, he must:

- 553 (1) keep a separate and distinct account of the trading, including, where appropriate, particulars of all local bank account<sup>2</sup> transactions; and
- 554 (2) incorporate in the financial records required to be kept by him<sup>3</sup> the total weekly amounts of the receipts and payments made by him in relation to the account kept under head (1) above<sup>4</sup>.

1 For the meaning of 'trustee' see para 28 note 2 ante.

2 For the meaning of 'local bank' and 'local bank account' see para 388 note 2 post.

3 Ie under the Insolvency Regulations 1994, SI 1994/2507, reg 24: see para 380 ante.

4 Ibid reg 26. As to retention and delivery of financial records see para 380 ante; and as to production and inspection of such records see para 383 post.

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN

BANKRUPTCY/(viii) Books, Accounts and Audit/382. Provision of accounts by trustee and audit of accounts.

### **382. Provision of accounts by trustee and audit of accounts.**

The trustee<sup>1</sup> must, if required by the Secretary of State at any time, send to the Secretary of State an account of his receipts and payments as trustee of the bankrupt covering such period as the Secretary of State may direct; and such account must, if so required by the Secretary of State, be certified by the trustee<sup>2</sup>.

Where the trustee vacates office prior to the holding of the final general meeting of creditors<sup>3</sup>, he must, within 14 days of vacating office, send to the Secretary of State an account of his receipts and payments as trustee for any period not covered by an account previously so sent by him, or, if no such account has been sent, an account of his receipts and payments in respect of the whole period of office<sup>4</sup>.

Where a final general meeting of creditors:

- 555 (1) has been held<sup>5</sup>; or
- 556 (2) is deemed to have been held<sup>6</sup>,

the trustee must send to the Secretary of State, in a case falling with head (1) above, within 14 days of the holding of that meeting and, in a case falling within head (2) above, within 14 days of his report to the court<sup>7</sup>, an account of his receipts and payments as trustee which are not covered by any previous account so sent by him, or, if no such account has been sent, an account of his receipts and payments in respect of the whole period of his office<sup>8</sup>.

Where a statement of affairs has been submitted under the Insolvency Act 1986, any account sent under these provisions must be accompanied by a summary of that statement of affairs and must show the amount of any assets realised and explain the reasons for any non-realisation of any assets not realised<sup>9</sup>. Where, however, a statement of affairs has not been submitted under the Insolvency Act 1986, any account sent under these provisions must be accompanied by a summary of all known assets and their estimated values and must show the amounts actually realised and explain the reasons for any non-realisation of any assets not realised<sup>10</sup>.

Any account sent to the Secretary of State must, if he so requires, be audited; but, whether or not he requires the account to be so audited, the trustee must send to him on demand any documents, including vouchers and bank statements, and any information relating to the account<sup>11</sup>.

1 For the meaning of 'trustee' see para 28 note 2 ante.

2 Insolvency Regulations 1994, SI 1994/2507, reg 28(1).

3 Ie under the Insolvency Act 1986 s 331: see para 606 post.

4 Insolvency Regulations 1994, SI 1994/2507, reg 28(2).

5 See note 3 supra.

6 Ie by virtue of the Insolvency Rules 1986, SI 1986/1925, r 6.137(5): see para 378 ante.

7 Ie pursuant to *ibid* r 6.137(5).

8 Insolvency Regulations 1994, SI 1994/2507, reg 28(3).

9 *Ibid* reg 28(4).

10 Ibid reg 28(5).

11 Ibid reg 28(6).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(viii) Books, Accounts and Audit/383. Production and inspection of records.

### 383. Production and inspection of records.

The trustee<sup>1</sup> must produce on demand to the Secretary of State, and allow him to inspect, any accounts, books and other records kept by the trustee, including any passed to him by a predecessor in office; and this duty to produce and inspect extends:

- 557 (1) to producing and allowing inspection at the premises of the trustee; and
- 558 (2) to producing and allowing inspection of any financial records<sup>2</sup> prepared by the trustee before 24 October 1994<sup>3</sup> and kept by him;

and any such demand may:

- 559 (a) require the trustee to produce any such accounts, books or other records to the Secretary of State, and allow him to inspect them at the same time as any account is sent to the Secretary of State<sup>4</sup> or at any time after such an account is sent to the Secretary of State, whether or not the Secretary of State requires the account to be audited; or
- 560 (b) where it is made for the purpose of ascertaining whether the provisions<sup>5</sup> relating to the handling of money received by the trustee in the course of carrying out his functions have been, or are likely to be, complied with, be made at any time, whether or not an account has been sent, or should have been sent, to the Secretary of State<sup>6</sup> and whether or not the Secretary of State has required any account to be audited<sup>7</sup>.

The trustee must allow the Secretary of State on demand to remove and take copies of any accounts, books and other records kept by the trustee, including any passed to him by a predecessor in office, whether or not they are kept at the premises of the trustee<sup>8</sup>.

1 For the meaning of 'trustee' see para 28 note 2 ante.

2 Ie any financial records of the kind described in the Insolvency Regulations 1986, SI 1994/2507, reg 24(1) (b): see para 380 head (2) ante.

3 Ie the date on which the Insolvency Regulations 1994, SI 1994/2507 (as amended) came into force: see reg 1.

- 4    le under *ibid* reg 28: see para 382 ante.
- 5    le any provisions of the Insolvency Regulations 1994, SI 1994/2507 (as amended).
- 6    See note 4 *supra*.
- 7    Insolvency Regulations 1994, SI 1994/2507, reg 29(1).
- 8    *Ibid* reg 29(2).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in **PARA 2 NOTE 5**.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(viii) Books, Accounts and Audit/384. Provision of information by trustee.

#### **384. Provision of information by trustee.**

The trustee<sup>1</sup> must, within 14 days of the receipt of a request from the bankrupt or any creditor for a statement of his receipts and payments as trustee, supply free of charge to the person making the request, a statement of his receipts and payments as trustee during the period of one year ending on the most recent anniversary of becoming trustee which preceded the request<sup>2</sup>.

- 1    For the meaning of 'trustee' see para 28 note 2 ante.
- 2    Insolvency Regulations 1994, SI 1994/2507, reg 25.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in **PARA 2 NOTE 5**.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(viii) Books, Accounts and Audit/385. Disposal of insolvent's books, papers and other records.

#### **385. Disposal of insolvent's books, papers and other records.**



The trustee<sup>1</sup>, on the authorisation of the official receiver, during his tenure of office or on vacating office, or the official receiver while acting as trustee<sup>2</sup>, may at any time sell, destroy or otherwise dispose of the books, papers and other records of the bankrupt<sup>3</sup>.

1 For the meaning of 'trustee' see para 28 note 2 ante.

2 See para 323 ante.

3 Insolvency Regulations 1994, SI 1994/2507, reg 30. As to the disposal of the records to be kept by all insolvency practitioners see para 79 ante.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ix) Banking Accounts/386. Payments into the Insolvency Services Account.

## **(ix) Banking Accounts**

### **386. Payments into the Insolvency Services Account.**

Subject to the provisions relating to local bank accounts where the trustee<sup>1</sup> exercises the power to carry on the business of the bankrupt<sup>2</sup>, the trustee must pay all money received by him in the course of carrying out his functions as such without any deduction into the Insolvency Services Account<sup>3</sup> kept by the Secretary of State with the Bank of England to the credit of the bankrupt once every 14 days or forthwith if £5,000 or more has been received<sup>4</sup>.

Every such payment of money into the Insolvency Services Account must be:

- 561 (1) made through the Bank Giro System; or
- 562 (2) sent direct to the Bank of England, Threadneedle Street, London EC2R 8AH, by cheque drawn in favour of the 'Insolvency Services Account' and crossed 'A/c payee only' 'Bank of England'; or
- 563 (3) made by electronic transfer;

and the trustee must on request be given by the Department of Trade and Industry a receipt for the money so paid<sup>5</sup>.

Every payment of money made under heads (1) and (2) above must be accompanied by a form obtainable from that Department for that purpose or by a form that is substantially similar; and every payment of money made under head (3) above must specify the name of the trustee making the payment and the name of the bankrupt to whose credit such payment is made<sup>6</sup>.

1 For the meaning of 'trustee' see para 28 note 2 ante.

2 ie those contained in the Insolvency Regulations 1994, SI 1994/2507, reg 21: see para 388 post.

- 3 As to the Insolvency Services Account see para 26 ante.
- 4 Insolvency Regulations 1994, SI 1994/2507, reg 20(1).
- 5 Ibid reg 20(2) (substituted by SI 2000/485).
- 6 Insolvency Regulations 1994, SI 1994/2507, reg 20(3) (amended by SI 2000/485).

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **386 Payments into the Insolvency Services Account**

TEXT AND NOTE 5--For 'Department of Trade and Industry' read 'Department for Business Innovation and Skills': SI 1994/2507 (amended by SI 2009/2748).

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### **387. Payment of disbursements etc out of the Insolvency Services Account.**

The trustee<sup>1</sup> must<sup>2</sup>, on application to the Department of Trade and Industry on a form obtainable from that Department or on a form which is substantially similar:

- 564 (1) be repaid all necessary disbursements made by him, and expenses properly incurred by him, in the course of his administration to the date of his vacation of office out of any money standing to the credit of the bankrupt in the Insolvency Services Account<sup>3</sup>;
- 565 (2) obtain payment instruments to the order of the payee for sums which become payable on account of the bankrupt for delivery by the trustee to the persons to whom the payments are to be made<sup>4</sup>.

In respect of an application made by the trustee under heads (1) or (2) above, the Secretary of State, if requested to do so by the trustee, may, however, at his discretion:

- 566 (a) make the payment which is the subject of the application to the trustee by electronic transfer; or
- 567 (b) as an alternative to the issue of payment instruments, make payment by electronic transfer to the persons to whom the trustee would otherwise deliver payment instruments<sup>5</sup>.

On the trustee vacating office, he must be repaid by any succeeding trustee, out of any funds available for the purpose, any necessary disbursements made by him and any expenses properly incurred by him but not repaid before he vacates office<sup>6</sup>.

- 1 For the meaning of 'trustee' see para 28 note 2 ante.
- 2 Is subject to the Insolvency Regulations 1994, SI 1994/2507, reg 22(2A) (as added): see infra.
- 3 Ibid reg 22(A1) (added by SI 2000/485); Insolvency Regulations 1994, SI 1994/2507, reg 22(1), (3). As to the Insolvency Services Account see para 26 ante. Any application to be made to the Secretary of State or to the Department or anything required to be sent to the Secretary of State or to the Department under the Insolvency Regulations 1994, SI 1994/2507 (as amended) must be addressed to the Department of Trade and Industry, The Insolvency Service, PO Box 3690, Birmingham B2 4UY: reg 3(3).
- 4 Ibid reg 22(A1) (added by SI 2000/485); Insolvency Regulations 1994, SI 1994/2507, reg 22(2), (3).
- 5 Ibid reg 22(2A) (added by SI 2000/485).
- 6 Insolvency Regulations 1994, SI 1994/2507, reg 22(4).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 387 Payment of disbursements etc out of the Insolvency Services Account

TEXT AND NOTE 5--For 'Department of Trade and Industry' read 'Department for Business Innovation and Skills': SI 1994/2507 (amended by SI 2009/2748).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(10) TRUSTEE IN BANKRUPTCY/(ix) Banking Accounts/388. Local bank account.

### 388. Local bank account.

Where the trustee<sup>1</sup> intends to exercise his power to carry on the business of the bankrupt, he may apply to the Secretary of State for authorisation to open a local bank account<sup>2</sup>; and the Secretary of State may authorise him to make his payments into and out of a specified bank, subject to a limit, instead of into and out of the Insolvency Services Account<sup>3</sup> if satisfied that an administrative advantage will be derived from having such an account<sup>4</sup>. Money received by a trustee relating to the purpose for which the account was opened may be paid into the local bank account to the credit of the bankrupt to whom the account relates<sup>5</sup>. Where a trustee opens a local bank account pursuant to an authorisation granted by the Secretary of State<sup>6</sup>, he must open and maintain the account in the name of the bankrupt<sup>7</sup>. Where money which does not form part of the bankrupt's estate is provided to the trustee for a specific purpose, it must be clearly identifiable in a separate account<sup>8</sup>.

Every trustee must keep proper records, including documentary evidence of all money paid into and out of every local bank account opened and maintained under these provisions<sup>9</sup>. The trustee must pay<sup>10</sup> without deduction any surplus over any authorised limit<sup>11</sup> into the Insolvency Services Account<sup>12</sup>.

As soon as the trustee ceases to carry on the business of the bankrupt or vacates office or an authorisation given by the Secretary of State<sup>13</sup> is withdrawn, he must close the account and remit<sup>14</sup> any balance to the Insolvency Services Account<sup>15</sup>.

1 For the meaning of 'trustee' see para 28 note 2 ante.

2 For these purposes, 'local bank account' means a current account opened with a local bank; and 'local bank' means any bank in, or in the neighbourhood of, the insolvency district in which the proceedings are taken or in the locality in which any business of the bankrupt is carried on: Insolvency Regulations 1994, SI 1994/2507, reg 3(1). 'Bank' means: (1) a person who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) to accept deposits; or (2) an EEA firm of the kind mentioned in s 31(1)(b), Sch 3 para 5(b) which has permission under Sch 3 para 15 as a result of qualifying for authorisation under Sch 3 para 12(1) to accept deposits: Insolvency Regulations 1994, SI 1994/2507, reg 3(1) (amended by SI 2001/3649).

3 As to payments into and out of the Insolvency Services Account see paras 386, 387 respectively ante; and as to the Insolvency Services Account see para 26 ante.

4 Insolvency Regulations 1994, SI 1994/2507, reg 21(1).

5 Ibid reg 21(2).

6 Ie pursuant to an authorisation granted under ibid reg 21(1): see supra.

7 Ibid reg 21(3).

8 Ibid reg 21(4).

9 Ibid reg 21(5). As to the financial records to be maintained by a responsible insolvency practitioner carrying on the business of the insolvent see para 380 ante.

10 Ie in accordance with ibid reg 20(1): see para 386 ante.

11 Ie any limit imposed by an authorisation granted under ibid reg 21(1): see supra.

12 Ibid reg 21(6).

13 See note 6 supra.

14 See note 10 supra.

15 Insolvency Regulations 1994, SI 1994/2507, reg 21(7).

## UPDATE

### 316-389 Trustee in bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 389. Claiming money paid into the Insolvency Services Account.

Any person claiming to be entitled to any money paid into the Insolvency Services Account<sup>1</sup> may apply to the Secretary of State for payment and must provide such evidence of the claim as the Secretary of State may require<sup>2</sup>.

Any person dissatisfied with the decision of the Secretary of State in respect of his claim made under the above provisions may appeal to the court<sup>3</sup>.

1 As to the Insolvency Services Account see para 26 ante.

2 Insolvency Regulations 1994, SI 1994/2507, reg 32(1).

3 Ibid reg 32(2). As to the procedure on appeal see para 749 post.

## **UPDATE**

### **316-389 Trustee in bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(i) Vesting of Property in Trustee/390. In general.

## **(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS**

### **(i) Vesting of Property in Trustee**

#### **390. In general.**

The object of bankruptcy law is that all the property comprised in the bankrupt's estate<sup>1</sup> should be realised by the trustee in bankruptcy and divided among the bankrupt's creditors<sup>2</sup>. Subject to certain statutory exceptions, the bankrupt's estate comprises:

- 568 (1) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy<sup>3</sup>; and
- 569 (2) any property which is comprised in that estate or is treated as falling within head (1) above<sup>4</sup>.

Property or other interests which the bankrupt acquires after the commencement of the bankruptcy do not form part of his estate unless, in certain circumstances, the trustee claims the property or other interest for the estate<sup>5</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 See *Smith v Coffin* (1795) 2 Hy Bl 444 at 461; *Gibson v Carruthers* (1841) 8 M & W 321 at 333; *Re Thomas, ex p IRC v Falconer* [1984] 1 WLR 232, CA (rescission of an order dismissing a creditor's petition where the dismissal would have deprived the general body of creditors of the debtor's available assets). See also *Hollinshed v Hazleton* [1916] 1 AC 428 at 436, HL ('There is [a] principle of public policy . . . that in bankruptcy the entire property of the bankrupt, of whatever kind or nature it be, whether alienable or inalienable, subject to

be taken in execution, legal or equitable, or not so subject, shall, with the exception of some compassionate allowances for his maintenance, be appropriated and made available for the payment of his creditors'). Under the Insolvency Act 1986 after-acquired property does not automatically vest in the trustee (see para 445 et seq post), but a trustee will in the proper discharge of his duties usually claim for the bankrupt's estate any after-acquired property of significant value.

3 As to the commencement of bankruptcy see para 213 ante.

4 See the Insolvency Act 1986 s 283 (as amended); and para 216 ante.

5 See para 445 et seq post.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(i) Vesting of Property in Trustee/391. Vesting of bankrupt's estate.

### **391. Vesting of bankrupt's estate.**

The bankrupt's estate<sup>1</sup> vests in the trustee immediately on his appointment taking effect<sup>2</sup> or, in the case of the official receiver, on his becoming trustee<sup>3</sup>. Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee<sup>4</sup>, it so vests without any conveyance, assignment or transfer<sup>5</sup>. In the case of real estate situated outside the United Kingdom, the property may pass only according to the law of the place where it is situated<sup>6</sup>. Where the bankrupt is the proprietor of any registered land or charge, his trustee is entitled to be registered as proprietor in the place of the bankrupt on production of evidence that the land or charge is comprised in the bankrupt's estate<sup>7</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 As to when the trustee's appointment takes effect see paras 320-322 ante.

3 Insolvency Act 1986 s 306(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 306 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 21. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 Ie whether under the Insolvency Act 1986 s 306 or under any other provision of Pt IX (ss 264-371) (as amended).

5 Ibid s 306(2).

6 *Re Boustead, ex p Rogers* (1881) 16 ChD 665, CA; *Callender, Sykes & Co v Lagos Colonial Secretary and Davies* [1891] AC 460, PC; Case C-294/92 *Webb v Webb* [1994] QB 696, [1994] 3 All ER 911, EC; *Re Hayward* [1997] Ch 45, [1997] 1 All ER 32; *Ashurst v Pollard* [2001] Ch 595, [2001] 2 All ER 75, CA. By the rules of private international law, immovable property may be transferred only in accordance with the lex situs: see CONFLICT OF LAWS vol 8(3) (Reissue) para 399 et seq. See further para 400 post.

7 See the Land Registration Act 1925 s 42(1) (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 5(2)); and LAND REGISTRATION. See also the Land Registration Rules 1925, SR & O 1925/1093, rr 174-177 (substituted by SI 1986/2116); and LAND REGISTRATION. On the death of the official receiver or trustee in bankruptcy registered as proprietor, his personal representatives may not be registered, but proceedings must be taken to register his successor in office: see the Land Registration Rules 1925, SR & O 1925/1093, r 173; and LAND REGISTRATION. As to the protection of creditors prior to registration of the trustee in bankruptcy see the Land Registration Act 1925 s 61 (as amended); and LAND REGISTRATION; and as to the interests subject to which the trustee holds see para 394 post. As to the severance of a joint tenancy and the vesting of property in a trustee see *Re Dennis (a bankrupt)* [1996] Ch 80, [1995] 3 All ER 171, CA; *Re Palmer (a debtor)* [1994] Ch 316, [1994] 3 All ER 835, CA; and see para 833 post.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **391 Vesting of bankrupt's estate**

NOTE 4--Bankrupt's entitlement to a residuary estate vests in the trustee on which trustee becomes entitled to receive assets representing residuary estate as and when administration of estate is complete, in priority to the executor: *Re Hemming; Raymond Saul & Co (a firm) v Holden* [2008] EWHC 2731 (Ch), [2009] Ch 313, [2008] All ER (D) 176 (Nov).

NOTE 7--Land Registration Act 1925 replaced by Land Registration Act 2002. SR & O 1925/1093, which lapsed on repeal of enabling authority by Land Registration Act 2002 Sch 13, replaced by Land Registration Rules 2003, SI 2003/1417: see LAND REGISTRATION.

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### **392. Items of excess value.**

Where property is excluded from the bankrupt's estate<sup>1</sup>, and it appears to the trustee that the realisable value of the whole or any part of that property exceeds the cost of a reasonable replacement<sup>2</sup> for that property or that part of it, the trustee may<sup>3</sup> by notice in writing claim that property or, as the case may be, that part of it for the bankrupt's estate<sup>4</sup>. However, except with the permission of the court, such a notice may not be served after the end of the period of 42 days beginning with the day on which the property in question first came to the knowledge of the trustee<sup>5</sup>.

On the service on the bankrupt of such a notice, the property to which the notice relates vests in the trustee as part of the bankrupt's estate; and, except against a purchaser in good faith, for value and without notice of the bankruptcy, the trustee's title to that property has relation back to the commencement of the bankruptcy<sup>6</sup>.

The trustee must apply the funds comprised in the estate to the purchase by or on behalf of the bankrupt of a reasonable replacement for any property vested in the trustee under the above provisions; and the duty imposed by the above provisions has priority over the obligation

of the trustee to distribute the estate<sup>7</sup>. A purchase of replacement property may be made either before or after the realisation by the trustee of the value of the property vesting in him<sup>8</sup>. The trustee is, however, under no obligation to apply funds to the purchase of a replacement for property vested in him, unless and until he has sufficient funds in the estate for that purpose<sup>9</sup>.

Where a third party proposes to the trustee that he, the third party, should provide the estate with a sum of money enabling the bankrupt to be left in possession of property which would otherwise be made to vest in the trustee, the trustee may accept that proposal, if satisfied that it is a reasonable one, and that the estate will benefit to the extent of the value of the property in question less the cost of a reasonable replacement<sup>10</sup>.

1    Ie by virtue of the Insolvency Act 1986 s 283(2): see para 216 ante.

2    For the purposes of *ibid* s 308, property is a reasonable replacement for other property if it is reasonably adequate for meeting the needs met by the other property: s 308(4).

3    Ie subject to *ibid* s 309 (as amended): see *infra*.

4    *Ibid* s 308(1) (amended by the Housing Act 1988 s 140(1), Sch 17 para 73). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 308 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5    Insolvency Act 1986 s 309(1)(b). For these purposes: (1) anything which comes to the knowledge of the trustee is deemed in relation to any successor of his as trustee to have come to the knowledge of the successor at the same time; and (2) anything which comes, otherwise than under head (1) *supra*, to the knowledge of a person before he is the trustee is deemed to come to his knowledge on his appointment taking effect or, in the case of the official receiver, on his becoming trustee: s 309(2).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 309 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986 Sch 1 Pt II para 23.

6    Insolvency Act 1986 s 308(2). As to commencement of bankruptcy see para 213 ante.

7    *Ibid* s 308(3). See *Re Rayatt (a bankrupt)* [1998] 2 FLR 264, [1998] BPIR 495 (trustee not entitled to set off cost of reasonable replacement against bankrupt's arrears under an income payments order).

8    Insolvency Rules 1986, SI 1986/1925, r 6.187(1).

9    *Ibid* r 6.187(2).

10   *Ibid* r 6.188(1), (2).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(i) Vesting of Property in Trustee/393. Tenancies.



### 393. Tenancies.

On the service on the bankrupt by the trustee of a notice in writing<sup>1</sup>, any tenancy:

- 570 (1) which is excluded<sup>2</sup> from the bankrupt's estate; and
- 571 (2) to which the notice relates,

vests in the trustee as part of the bankrupt's estate, and, except against a purchaser in good faith, for value and without notice of the bankruptcy, the trustee's title to that tenancy has relation back to the commencement of the bankruptcy<sup>3</sup>.

However, except with the permission of the court, such a notice may not be served after the end of the period of 42 days beginning with the day on which the tenancy in question first came to the knowledge of the trustee<sup>4</sup>.

1 le under the Insolvency Act 1986 s 308A (as added): see infra.

2 le by virtue of ibid s 283(3A) (as added): see para 216 heads (e)-(h) ante.

3 Ibid s 308A (added by the Housing Act 1988 s 117(2)). As to the commencement of the bankruptcy see para 213 ante. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 308A (as added) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 Insolvency Act 1986 s 309(1)(b) (amended by the Housing Act 1988 s 117(3)). For these purposes: (1) anything which comes to the knowledge of the trustee is deemed in relation to any successor of his as trustee to have come to the knowledge of the successor at the same time; and (2) anything which comes, otherwise than under head (1) supra, to the knowledge of a person before he is the trustee is deemed to come to his knowledge on his appointment taking effect or, in the case of the official receiver, on his becoming trustee: Insolvency Act 1986 s 309(2).

As to the application of s 309 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 392 note 5 ante.

## UPDATE

### 390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 394. Title acquired by trustee.

The general rule is that the trustee in bankruptcy takes no better title to property than the bankrupt himself had<sup>1</sup>. The bankrupt's property passes to the trustee in the same plight and

condition in which it was in the bankrupt's hands, and is subject to all the equities<sup>2</sup> and liabilities<sup>3</sup> which affected it in the bankrupt's hands, to all dispositions which have been validly made by the bankrupt, and to all rights which have been validly acquired by third persons at the commencement of the bankruptcy<sup>4</sup>.

If the bankrupt is possessed of an unincumbered estate in fee simple, that estate passes to the trustee; if he has an entailed interest or life interest<sup>5</sup>, the trustee has that interest and no more. Where the trustee has been registered as the proprietor of any registered land or charge<sup>6</sup>, he holds it on the trusts and subject to any minor interests under which the bankrupt held it<sup>7</sup>.

1 *Bendall v McWhirter* [1952] 2 QB 466 at 487, [1952] 1 All ER 1307 at 1317, CA per Romer LJ, who approved the proposition stated in the text to notes 2-4 infra. Although the application to the facts of the case of the principle stated in the text, for the purposes of conferring on the deserted wife of a bankrupt a 'status of irremovability' with respect to the matrimonial home, which was binding on the husband's trustee in bankruptcy, was overruled in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472, HL, the speeches in the House of Lords treat the principle as correctly stated and as unimpaired: see eg per Lord Wilberforce at 1256-1258 and at 499-501. See also note 3 infra. As to the rights of a spouse to occupy the matrimonial home see paras 647, 648 post.

2 *Re Scheibler, ex p Holthausen* (1874) 9 Ch App 722; *Re Garrud, ex p Newitt* (1881) 16 ChD 522 at 531, CA; *Re Wallis, ex p Jenks* [1902] 1 KB 719; *Re Clark, ex p Beardmore* [1894] 2 QB 393 at 410, CA; *Re Beeston, ex p Board of Trade* [1899] 1 QB 626 at 630, CA; *Re Wait* [1927] 1 Ch 606 at 629, CA. Thus, a statutory assignee, who first gives notice of his title to the trustees of a fund, obtains no priority by so doing over assignees for value, nor even over a prior statutory assignee, who may not have given notice: *Re Anderson, ex p New Zealand Official Assignee* [1911] 1 KB 896. The title of a trustee to goods which he finds in the bankrupt's possession is subject to the rights of third parties, including any right of the vendors of the goods to disaffirm the contract: *Re Eastgate, ex p Ward* [1905] 1 KB 465; *Tilley v Bowman Ltd* [1910] 1 KB 745. Property which the bankrupt before bankruptcy has affected to sell by a colourable transaction will be divisible among his creditors on bankruptcy: *Re Hirth, ex p Trustee* [1899] 1 QB 612, CA. Money paid into court before bankruptcy in an action brought against the bankrupt is specifically fixed with the claimant's equities, and the trustee has no rights over it except subject to such equities: *Hitchens v Congreve* (1831) Mont 225; *Murray v Arnold* (1862) 3 B & S 287; *Re Keyworth, ex p Banner* (1874) 9 Ch App 379.

As to property held by the bankrupt in trust see the Insolvency Act 1986 s 283(3)(a); and para 216 head (c) ante. See also para 428 et seq post.

3 As to liabilities incumbent on the trustee in bankruptcy see note 4 infra. In *Bradley-Hole v Cusen* [1953] 1 QB 300, sub nom *Hole v Cuzen* [1953] 1 All ER 87, CA, a tenant was held entitled to deduct, from rent payable to his landlord's trustee in bankruptcy, rent previously overpaid by him to his landlord, pursuant to the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 s 14(1) (repealed); that case, though following *Bendall v McWhirter* [1952] 2 QB 466, [1952] 1 All ER 1307, CA, which was overruled in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472, HL, was itself treated by the House of Lords in *National Provincial Bank Ltd v Ainsworth* supra at 1222, 1258 and at 478, 500, 501 as correctly decided.

4 The trustee takes the bankrupt's property subject to all liens and contingent liabilities. Thus, where a person arrested was found in possession of money, and before conviction he was adjudged bankrupt, and on his conviction the money found on him was ordered to be applied towards the costs of the prosecution, the order was held to be valid, notwithstanding the intervening bankruptcy: *R v Roberts* (1873) LR 9 QB 77. In *Re Pascoe* [1944] Ch 219, [1944] 1 All ER 281, CA, however, where money, acquired by a bankrupt after his bankruptcy, was in the hands of the police and after his conviction the criminal court by order applied this money towards the costs of the prosecution, the Court of Appeal held that that order was ineffective to deprive the trustee of the money.

A trustee is bound by the bankrupt's acknowledgments except in the exercise of his powers to admit or reject proofs: *London and Westminster Bank v Button* (1907) 51 Sol Jo 466; but cf *Re Van Laun, ex p Chatterton* [1907] 2 KB 23, CA; and see para 490 et seq post.

Property, possession of which has been obtained by the bankrupt by fraud or mistake, does not pass to the bankrupt, and remains in the original owner: *Gladstone v Hadwen* (1813) 1 M & S 517; *Load v Green* (1846) 15 M & W 216 at 221; *Re Shackleton, ex p Whittaker* (1875) 10 Ch App 446; *Re Reed, ex p Barnett* (1876) 3 ChD 123; and see *Re Eastgate, ex p Ward* [1905] 1 KB 465; *Tilley v Bowman Ltd* [1910] 1 KB 745. However, the position is different where the bankrupt, having a voidable title to goods, has disposed of them to a bona fide purchaser without notice before the title has been avoided: see the Sale of Goods Act 1979 s 23; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 154 et seq. As to rights arising out of contracts made by the bankrupt see para 417 post.

5 As to the trustee's rights over the bankrupt's estate tail see para 461 head (5) post; as to the legal estate in settled land or property held on trust see para 429 post; and as to the rights of an assignee from the trustee in bankruptcy of an equitable life interest in real estate to be let into possession of the rents and profits see *Re Hunt, Pollard v Greake* [1900] WN 65; on appeal 36 LJNC 362, CA. Since 1 January 1997 it is no longer possible to create any new entailed interests: see REAL PROPERTY vol 39(2) (Reissue) para 119.

6 See para 391 ante.

7 See the Land Registration Act 1925 s 43; and LAND REGISTRATION.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **394 Title acquired by trustee**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 7--Land Registration Act 1925 replaced by Land Registration Act 2002: see LAND REGISTRATION.

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#### **395. Property exempt from vesting in trustee.**

Certain allowances, pensions and other statutory benefits are expressly declared by the statutes creating them<sup>1</sup> to be inalienable and to be incapable of vesting in the trustee in bankruptcy or other representative of the creditors of the person to whom the payment is to be made<sup>2</sup>.

Where a bankruptcy order is made against a person on a petition presented on or after 29 May 2000, any rights he has under an approved pension arrangement are excluded from his estate<sup>3</sup>.

Where a charging order or restraint order<sup>4</sup> has been made by a criminal court against a person before he is made bankrupt, the property rights which are the subject of such orders, or the proceeds of realisation in the hands of a receiver appointed by the court, are excluded from the bankrupt's estate<sup>5</sup>.

Where a person is adjudged bankrupt in England and Wales:

572 (1) property for the time being subject to a freezing order<sup>6</sup>, or an order having the like effect in Scotland, made before the order adjudging him bankrupt; and

573 (2) any proceeds of property realised by a receiver appointed by the High Court for the time being in the hands of a receiver so appointed,

are excluded from the bankrupt's estate<sup>7</sup>.

1 See para 216 note 33 ante.

2 As to whether the trustee may make an application for an income payments order in respect of such payments see para 449 et seq post.

3 See the Welfare Reform and Pensions Act 1999 s 11(1) (which entered fully into force on 29 May 2000: see s 89(5); the Welfare Reform and Pensions Act 1999 (Commencement No 7) Order 2000, SI 2000/1382, art 2(a); and SOCIAL SECURITY AND PENSIONS); and the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836 (which came into force on 6 April 2002: see reg 1(1)) and SOCIAL SECURITY AND PENSIONS. For the meaning of 'approved pension arrangement' see the Welfare Reform and Pensions Act 1999 s 11(2) (which entered fully into force on 29 May 2000: see s 89(5); the Welfare Reform and Pensions Act 1999 (Commencement No 7) Order 2000, SI 2000/1382, art 2(a)); the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 2; and SOCIAL SECURITY AND PENSIONS. The reference in the Welfare Reform and Pensions Act 1999 s 11(1) to rights under an approved pension arrangement does not include a personal pension scheme approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655 (as amended): see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 710 et seq) unless those rights arise by virtue of approved personal pension arrangements: see the Welfare Reform and Pensions Act 1999 s 11(3) (which entered fully into force on 29 May 2000: see s 89(5); the Welfare Reform and Pensions Act 1999 (Commencement No 7) Order 2000, SI 2000/1382, art 2(a)); and SOCIAL SECURITY AND PENSIONS.

The Secretary of State may by regulations make provision for or in connection with enabling rights of a person under an unapproved pension arrangement to be excluded from a bankrupt's estate: see the Welfare Reform and Pensions Act 1999 s 12(1) (which entered fully into force on 6 April 2002: see s 89(5); the Welfare Reform and Pensions Act 1999 (Commencement No 13) Order 2002, SI 2002/153, art 2(b)); and SOCIAL SECURITY AND PENSIONS. In exercise of the power so conferred the Secretary of State made the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 3 (meaning of 'unapproved pension arrangement'), reg 4 (exclusion of rights under unapproved pension arrangements), reg 5 (exclusion orders) and reg 6 (qualifying agreements), all of which came into force on 6 April 2002: reg 1(1). See further SOCIAL SECURITY AND PENSIONS.

As to the recovery of excessive pension contributions made by persons who have become bankrupt see para 668 et seq post.

As to the vesting in the trustee of pension rights in relation to bankruptcy orders made on petitions presented before 29 May 2000 see *Krasner v Dennison*, *Lawrence v Lesser* [2001] Ch 76, [2000] 3 All ER 234, CA (the inclusion of a non-assignment clause in the terms of a pension policy will not, in the event of bankruptcy of the policyholder, prevent the benefits under the policy from vesting in the trustee as part of the bankrupt's estate). See also *Patel v Jones* [2001] EWCA Civ 779, [2001] BPIR 919; *Re Landau (a bankrupt)* [1998] Ch 223, sub nom *Re Landau (a bankrupt)*, *Pointer v Landau* [1997] 3 All ER 322; and para 449 post.

4 Ie pursuant to Criminal Justice Act 1988 s 77, 78 (as amended).

5 See *ibid* s 84 (as amended). Where a restraint order has been made against a person pursuant to s 77 (as amended) restraining him from dealing with his realisable property, any unauthorised seizure or disposal of such property by a person acting as an insolvency practitioner, who has reasonable grounds for believing that he is entitled so to deal with it, does not expose him to liability for any resulting loss or damage, subject to any claim in negligence for loss or damage: see s 87(1). For the meaning of 'act as an insolvency practitioner' see para 43 ante.

6 As to the making of freezing orders generally see the International Criminal Court Act 2001 s 38, Sch 6; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 449.

7 See *ibid* Sch 6 para 9(1); and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 449. Where an insolvency practitioner seizes or disposes of property which is subject to a freezing order and he reasonably believes that he is entitled to do so in the exercise of his functions and he would be so entitled if the property were not subject to a freezing order, the insolvency practitioner is not liable to any person in respect of any loss or damage resulting from the seizure or disposal, except in so far as the loss or damage is caused by his negligence: see Sch 6 para 13(1), (2); and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 449.

## UPDATE

### 390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **395 Property exempt from vesting in trustee**

NOTE 3--See also *Re Malcolm* [2004] EWCA Civ 1748, [2005] 1 WLR 1238.

NOTE 4--Criminal Justice Act 1988 ss 77, 78 repealed: Proceeds of Crime Act 2002 Sch 11 paras 1, 17(1), (2)(a), Sch 12.

NOTE 5--1988 Act ss 84, 87 repealed: 2002 Act Sch 11 paras 1, 17(1), (2)(a), Sch 12.

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### **396. Bankrupt's documents and records.**

The trustee must take possession of all books, papers and other records which relate to the bankrupt's estate<sup>1</sup> or affairs<sup>2</sup> and which belong to him or are in his possession or under his control, including any which would be privileged from disclosure in any proceedings<sup>3</sup>.

The bankrupt must deliver up to the trustee possession of any property, books, papers or other records of which he has possession or control and of which the trustee is required to take possession<sup>4</sup>. If any of the following is in possession of any property, books, papers or other records of which the trustee is required to take possession, namely:

- 574 (1) the official receiver;
- 575 (2) a person who has ceased to be trustee of the bankrupt's estate; or
- 576 (3) a person who has been the supervisor of a voluntary arrangement approved in relation to the bankrupt under Part VIII of the Insolvency Act 1986<sup>5</sup>,

the official receiver or, as the case may be, that person must deliver up possession of the property, books, papers or records to the trustee<sup>6</sup>.

If any person without reasonable excuse fails to comply with any such obligation<sup>7</sup>, he is guilty of a contempt of court and liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>8</sup>.

Any banker or agent of the bankrupt or any other person who holds any property to the account of, or for, the bankrupt must pay or deliver to the trustee all property in his possession or under his control which forms part of the bankrupt's estate and which he is not by law entitled to retain as against the bankrupt or trustee<sup>9</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 For the meaning of references to a person's affairs see para 81 note 4 ante.

3 Insolvency Act 1986 s 311(1). This does not apply to personal items which do not form part of the bankrupt's estate: see *Haig v Aitken* [2001] Ch 110, [2000] 3 All ER 80 (personal correspondence even of a famous person which might be of value did not form part of the bankrupt's estate); Application 33274/96 *Foxley v United Kingdom* (2000) 8 BHRC 571, ECtHR (correspondence from legal advisers to bankrupt not part of the

estate and should not even be opened by a trustee who had obtained a redirection order under the Insolvency Act 1986 s 371 (as amended) (see para 264 ante)).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 311 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post. As to the question of joint privilege see *Re Konigsberg (a bankrupt), ex p Trustee v Konigsberg* [1989] 3 All ER 289, sub nom *Re Konigsberg (a bankrupt), ex p Trustee of Property of Bankrupt v Konigsberg* [1989] 1 WLR 1257.

4 Insolvency Act 1986 s 312(1). Section 312(1) is without prejudice to the general duties of the bankrupt under s 333 (see para 345 ante): s 312(1). See also para 243 note 7 ante. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 312 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 23.

5 Ie under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.

6 Ibid s 312(2).

7 Ie under ibid s 312: see supra.

8 Ibid s 312(4). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq; and as to offences see para 707 et seq post. For the prescribed form of affidavit in support of an application for committal for contempt of court see the Insolvency Rules 1986, SI 1986/1925, rr 12.7(1), (2), Sch 4, Form 7.15 (substituted by SI 1991/495); and for the prescribed form of warrant of committal for contempt see the Insolvency Rules 1986, SI 1986/1925, Sch 4, Form 7.17.

9 Insolvency Act 1986 s 312(3).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **396 Bankrupt's documents and records**

NOTE 8--SI 1986/1925 Sch 4 Forms 7.15, 7.17 revoked: SI 2010/686.

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### **397. Property transferable on company books.**

Where any part of the bankrupt's estate<sup>1</sup> consists of stock or shares in a company, shares in a ship, or any other property transferable in the books of a company, office or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt<sup>2</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

<sup>2</sup> Insolvency Act 1986 s 311(3). See *Re Bentham Mills Spinning Co* (1879) 11 ChD 900, CA; *Re Cannock and Rugeley Colliery Co, ex p Harrison* (1885) 28 ChD 363, CA; *Re Key & Son Ltd* [1902] 1 Ch 467; *Re London and Provincial Telegraph Co* (1870) LR 9 Eq 653.

As to the application of the Insolvency Act 1986 s 311 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 396 note 3 ante.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **398. Things in action.**

Where any part of the bankrupt's estate<sup>1</sup> consists of things in action, they are deemed to have been assigned to the trustee; but notice of the deemed assignment need not be given except in so far as it is necessary, in a case where the deemed assignment is from the bankrupt himself, for protecting the priority of the trustee<sup>2</sup>.

<sup>1</sup> For the meaning of 'the bankrupt's estate' see para 216 ante.

<sup>2</sup> Insolvency Act 1986 s 311(4). A trustee in bankruptcy is not in the position of an assignee or incumbrancer for value, but is only a statutory assignee; he cannot, therefore, by giving notice, gain priority over an assignee for value before the bankruptcy who has not given notice: *Re Wallis, ex p Jenks* [1902] 1 KB 719; and see *Re Anderson, ex p New Zealand Official Assignee* [1911] 1 KB 896; para 394 ante; and para 407 post.

As to the application of the Insolvency Act 1986 s 311 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 396 note 3 ante.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(i) Vesting of Property in Trustee/399. Goods held as security.

### 399. Goods held as security.

Where any goods comprised in the bankrupt's estate<sup>1</sup> are held by any person by way of pledge, pawn or other security and no notice has been served in respect of those goods by the official receiver<sup>2</sup>, the trustee may serve such a notice in respect of the goods; and, whether or not a notice has been served<sup>3</sup>, the trustee may, if he thinks fit, exercise the bankrupt's right of redemption in respect of any such goods<sup>4</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 Ie under the Insolvency Act 1986 s 285(5): see para 218 ante.

3 Ie under ibid s 285(5) or s 311(5).

4 Ibid s 311(5). A notice served by the trustee under s 311(5) has the same effect as a notice served by the official receiver under s 285(5): s 311(6).

As to the application of s 311 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 396 note 3 ante.

### UPDATE

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **(ii) Property Available to the Trustee**

#### **400. Meaning of 'property'.**

'Property' includes money, goods, things in action<sup>1</sup>, land and every description of property wherever situated<sup>2</sup> and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property<sup>3</sup>. References in the Insolvency Act 1986<sup>4</sup> to property, in relation to a bankrupt, include references to any power exercisable by him over or in respect of property except in so far as the power is exercisable over or in respect of property not for the time being comprised in the bankrupt's estate<sup>5</sup> and:

577 (1) is so exercisable at a time after either the official receiver has had his release<sup>6</sup> in respect of that estate or a meeting summoned by the trustee of that estate<sup>7</sup> has been held; or

578 (2) cannot be so exercised for the benefit of the bankrupt;



and a power exercisable over or in respect of property is deemed<sup>8</sup> to vest in the person entitled to exercise it at the time of the transaction or event by virtue of which it is exercisable by that person, whether or not it becomes exercisable at that time<sup>9</sup>.

1 As to 'things in action' see CHOSER IN ACTION; *Ord v Upton* [2000] Ch 352, sub nom *Ord v Upton (as trustee to the property of Ord)* [2000] 1 All ER 193, CA (all things in action relating to property are included in the bankrupt's estate and a bankrupt's action in negligence for damages for personal injury is a single cause of action for a hybrid claim, in part personal and in part relating to property, and, as such, vests in the trustee in bankruptcy though any damages received in respect of the personal claim will be held on trust for the bankrupt), following *Heath v Tang*, *Stevens v Peacock* [1993] 4 All ER 694, [1993] 1 WLR 1421; *Cork v Rawlins* [2001] EWCA Civ 197, [2001] Ch 792, sub nom *Cork (as trustee in bankruptcy for Rawlins) v Rawlins* [2001] EWCA Civ 202, [2001] 4 All ER 50 (benefits payable under an insurance policy following a bankrupt's disablement, which are not calculated by reference to pain and suffering, are divisible among the creditors in the bankruptcy); *Dear v Reeves* [2001] EWCA Civ 277, [2001] 3 WLR 662, [2001] 1 BCLC 643 (right of pre-emption is property within the meaning of the Insolvency Act 1986 s 436); and see *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686, CA (where it was held that the right to litigate a cause of action was a thing in action for the purposes of the Bankruptcy Act 1914 (repealed) which the trustee could assign to the bankrupt for a share of the net proceeds of the action, if any). See further para 434 et seq post.

2 'Property wherever situated' means property anywhere in the world: *Singh v Official Receiver* [1997] BPIR 530. Under principles of private international law, personal property, wherever situated, will be held to have passed to the trustee: see *Re Osborn, ex p Trustee* [1931-32] B & CR 189; *Re Kooperman* [1928] B & CR 49. For the position as regards real property see para 391 ante.

As to the effect of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968), enacted by the Civil Jurisdiction and Judgments Act 1982 (see CONFLICT OF LAWS vol 8(3) (Reissue) para 65 et seq), on a trustee's attempts to recover property situated abroad by proceedings in the English courts see *Re Hayward* [1997] Ch 45, [1997] 1 All ER 32; *Ashurst v Pollard* [2001] Ch 595, [2001] 2 All ER 75, CA.

3 Insolvency Act 1986 s 436. 'Property' in this context cannot refer to a mere hope or possibility of receiving property: *Re Campbell (a bankrupt)* [1997] Ch 14, [1996] 2 All ER 537 (prospect of compensation from the Criminal Injuries Compensation Board under the pending application did not vest in the trustee and there was no right to enforce an award); and see para 403 post.

As to the application of the Insolvency Act 1986 s 436 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 21 note 11 ante.

The deposit paid by an underwriter on admission to Lloyd's does not constitute property which passes to his creditors on his bankruptcy (*Re Heathcote, ex p Trustee* (1912) Times, 17 July); nor is a British passport part of the bankrupt's property (*Re Suwalsky, Suwalsky v Trustee and Official Receiver* [1928] B & CR 142), although it may be impounded by the court in the exercise of its discretion pending fulfilment by the bankrupt of his duties (*Re Greystoke (a bankrupt) (No 2)* [1998] BPIR 77). Examples of property which have been held to fall within the Insolvency Act 1986 s 436 are milk quota (*Swift v Dairywise Farms Ltd* [2000] 1 All ER 320, [2000] 1 WLR 1177), a waste management licence (*Re Celtic Extraction Ltd (in liquidation), Re Bluestone Chemicals Ltd (in liquidation)* [1999] 4 All ER 684, [2000] 2 WLR 991, CA), the rights of a songwriter to payments from the Performing Right Society (*Performing Right Society Ltd v Rowland, Rowland v Turp* [1997] 3 All ER 336) and the entitlement of the holder of a fishing licence to be considered for the grant of a new licence (*Re Rae* [1995] BCC 102). The bankrupt's personal correspondence, even if of potential value, is of a peculiarly personal nature and does not constitute property which forms part of the bankrupt's estate available for creditors: *Haig v Aitken* [2001] Ch 110, [2000] 3 All ER 80.

As to the position of assets which are subject to an individual voluntary arrangement under the Insolvency Act 1986 Pt VIII (ss 252-263) at the date of the bankruptcy order see para 123 ante.

4 le in *ibid* Pts VIII-XI (ss 252-385) (as amended).

5 For the meaning of 'the bankrupt's estate' see para 216 ante.

6 le under the Insolvency Act 1986 s 299(2): see para 377 ante.

7 le under *ibid* s 331: see para 606 post.

8 le for the purposes of any of *ibid* Pts VIII-XI (see 252-385) (as amended).

9 Ibid s 283(4). As to the modifications to s 283(4) which apply in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 216 note 5 ante.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **400 Meaning of 'property'**

NOTE 3--In the application of the 1986 Act to proceedings by virtue of EC Council Regulation 1346/2000 on insolvency proceedings art 3, a reference to property is a reference to property which may be dealt with in the proceedings: 1986 Act s 436A (added by SI 2002/1240).

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### **401. Charge on bankrupt's home.**

Where any property consisting of an interest in a dwelling house<sup>1</sup> which is occupied by the bankrupt or by his spouse or former spouse is comprised in the bankrupt's estate<sup>2</sup> and the trustee is, for any reason, unable for the time being to realise that property, the trustee may apply to the court for an order imposing a charge on the property for the benefit of the bankrupt's estate<sup>3</sup>. If, on such an application, the court imposes a charge on any property, the benefit of that charge is comprised in the bankrupt's estate and is enforceable, up to the value from time to time of the property secured, for the payment of any amount which is payable otherwise than to the bankrupt out of the estate and of interest<sup>4</sup> on that amount at the prescribed rate<sup>5</sup>.

Where the trustee applies to the court for such an order, the bankrupt's spouse or former spouse must be made respondent to the application; and the court may, if it thinks fit, direct other persons to be made respondents also, in respect of any interest which they may have in the property<sup>6</sup>. The trustee must make a report to the court, containing the following particulars:

579 (1) the extent of the bankrupt's interest in the property which is the subject of the application; and

580 (2) the amount which, at the date of the application, remains owing to unsecured creditors of the bankrupt<sup>7</sup>.

The terms of the charge to be imposed must be agreed between the trustee and the bankrupt or, failing agreement, must be settled by the court<sup>8</sup>. The court's order must also:

581 (a) describe the property to be charged;

- 582 (b) state whether the title to the property is registered and, if it is, specify the title number;
- 583 (c) set out the extent of the bankrupt's interest in the property which has vested in the trustee;
- 584 (d) indicate, by reference to any, or the total, the amount which is payable otherwise than to the bankrupt out of the estate and of interest on that amount, how the amount of the charge to be imposed is to be ascertained;
- 585 (e) set out the conditions, if any, imposed by the court under the Charging Orders Act 1979<sup>9</sup>;
- 586 (f) identify when any property charged is to cease to be comprised in the bankrupt's estate and, subject to the charge (and any prior charge), to vest in the bankrupt<sup>10</sup>.

Forthwith after the making of the court's order, the trustee must send notice of it and its effects to the Chief Land Registrar<sup>11</sup>.

1 For these purposes, 'dwelling house' includes any building or part of a building which is occupied as a dwelling and any yard, garden, garage or outhouse belonging to the dwelling house and occupied with it: Insolvency Act 1986 s 385(1). As to the application of s 385 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 6 note 8 ante.

2 For the meaning of 'the bankrupt's estate' see para 216 ante.

3 Insolvency Act 1986 s 313(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 313 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 The rate of interest applicable under the Insolvency Act 1986 s 313(2) is the rate specified in the Judgments Act 1838 s 17 (as amended) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1307) on the day on which the charge is imposed, and the rate so applicable must be stated in the court's order imposing the charge: Insolvency Rules 1986, SI 1986/1925, r 6.237(1), (5).

5 Insolvency Act 1986 s 313(2). An order under s 313 made in respect of property vested in the trustee must provide, in accordance with the Insolvency Rules 1986, SI 1986/1925 (as amended), for the property to cease to be comprised in the bankrupt's estate and, subject to the charge, and any prior charge, to vest in the bankrupt: Insolvency Act 1986 s 313(3). As to the order see infra. The Charging Orders Act 1979 s 3(1), (2), (4)-(6) (see CIVIL PROCEDURE vol 12 (2009) PARA 1467 et seq) has effect in relation to orders under the Insolvency Act 1986 s 313 as in relation to charging orders under the Charging Orders Act 1979: Insolvency Act 1986 s 313(4).

6 Insolvency Rules 1986, SI 1986/1925, r 6.237(1), (2).

7 Ibid r 6.237(1), (3).

8 Ibid r 6.237(1), (4).

9 Ie under the Charging Orders Act 1979 s 3(1): see CIVIL PROCEDURE vol 12 (2009) PARA 1467.

10 Insolvency Rules 1986, SI 1986/1925, r 6.237(1), (6) (amended by SI 1987/1919). Unless the court is of the opinion that a different date is appropriate, the date under the Insolvency Rules 1986, SI 1986/1925, r 6.237(6)(f) (as so amended) (see text head (f) supra) must be that of the registration of the charge in accordance with the Charging Orders Act 1979 s 3(2) (see CIVIL PROCEDURE vol 12 (2009) PARA 1481): Insolvency Rules 1986, SI 1986/1925, r 6.237(1), (7). For the prescribed form of order see rr 6.237, 12.7(1), (2), Sch 4, Form 6.79A (added by SI 1987/1919).

11 Insolvency Rules 1986, SI 1986/1925, r 6.237(1), (8).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **401 Charge on bankrupt's home**

TEXT AND NOTES 1-3--Where property comprised in the bankrupt's estate consists of an interest in a dwelling-house which at the date of the bankruptcy was the sole or principal residence of the bankrupt, the bankrupt's spouse or civil partner, or a former spouse or former civil partner of the bankrupt, and the trustee applies for an order for the sale of the property, for an order for possession of the property or for an order under the Insolvency Act 1986 s 313 in respect of the property, the court must dismiss the application if the value of the interest is below the prescribed amount: s 313A(1), (2) (s 313A added by the Enterprise Act 2002 s 261(3); s 313A(1) amended by Civil Partnership Act 2004 Sch 27 para 115). For these purposes, the amount so prescribed is £1,000: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 3, Schedule Pt II (Schedule Pt II substituted by SI 2004/547; SI 1986/1996 art 3 amended by SI 2009/465). In determining the value of such an interest the court must disregard any matter which it is required to disregard by the order which prescribes the amount: 1986 Act s 313A(3). 'Prescribed' means prescribed by the rules; and 'the rules' means rules made under s 412: s 384(1) (see further PARA 200). The amount to be disregarded in determining the value of the bankrupt's interest for the purposes of s 313A(2) is that part of the value of the property in which the bankrupt's interest subsists which is equal to the value of any loans secured by mortgage or other charge against the property, any other third party interest, and the reasonable costs of sale: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 5 (added by SI 2004/547).

TEXT AND NOTE 3--1986 Act s 313(1) amended: Civil Partnership Act 2004 Sch 27 para 114.

NOTE 3--See also *Gotham v Doodes* [2006] EWCA Civ 1080, [2007] 1 All ER 527.

TEXT AND NOTES 4-11--SI 1986/1925 r 6.237, Sch 4 Form 6.79A substituted by rr 6.237, 6.327A-C, 6.327CA, 6.237D (amended by SI 2004/584), SI 1986/1925 r 6.237E, Sch 4 Form 6.79A (substituted by SI 2004/584), SI 1986/1925 Sch 4 Forms 6.82-6.84 (Form 6.84 substituted by SI 2005/527): SI 2003/1730, SI 2004/584. SI 1986/1925 rr 6.237, 6.237A, 6.237B, 6.237D further amended, SI 1986/1925 Sch 4 Form 6.83 substituted: SI 2005/2114.

TEXT AND NOTES 4, 5--For 'the value ... secured' read 'the charged value from time to time': *ibid* s 313(2) (s 313(2) amended by the 2002 Act s 261(2)(a)). 'The charged value' means the amount specified in the charging order as the value of the bankrupt's interest in the property at the date of the order, plus interest on that amount from the date of the charging order at the prescribed rate: 1986 Act s 313(2A) (s 313(2A), (2B) added by the 2002 Act s 261(2)(b)). In determining the value of an interest for the purposes of the 1986 Act s 313 the court must disregard any matter which it is required to disregard by the rules: s 313(2B). An order under the 1979 Act s 3(5) may not vary a charged value: 1986 Act s 313(5) (added by the 2002 Act s 261(2)(c)).

ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(ii) Property Available to the Trustee/402. Provisions for bankrupt's maintenance.

#### **402. Provisions for bankrupt's maintenance.**

Settlements providing for the determination of life estates on bankruptcy often contain provisions enabling the trustees in whom the trust estate is vested to apply the income to the maintenance of the bankrupt or of his wife and family. Where any interest at all remains in the bankrupt, it will pass to his creditors<sup>1</sup>; but, if the trustees have an absolute discretion as to the application of the income, no interest passes to the creditors<sup>2</sup> unless the trustees of the settlement, in the exercise of their discretion, pay to the bankrupt more than is necessary for his mere support; in that event, the trustee in bankruptcy will be able to claim the excess for the estate<sup>3</sup>.

1 *Kearsley v Woodcock* (1843) 3 Hare 185. If property is so settled that the income cannot be paid to anyone but the bankrupt, and there is no direction to accumulate, the bankrupt's interest passes to his trustee in bankruptcy; in such a case a discretion to pay a larger or smaller amount to the bankrupt would, it seems, be determined by bankruptcy: *Green v Spicer* (1830) 1 Russ & M 395; *Piercy v Roberts* (1832) 1 My & K 4; *Snowdon v Dales* (1834) 6 Sim 524; *Younghusband v Gisborne* (1846) 15 LJ Ch 355.

2 *Holmes v Penney* (1856) 3 K & J 90; *Twopeny v Peyton* (1840) 10 Sim 487; *Godden v Crowhurst* (1842) 10 Sim 642; *Re Bullock, Good v Lickorish* (1891) 60 LJ Ch 341; and see *Re Coleman, Henry v Strong* (1888) 39 ChD 443, CA.

3 Where, at any time after the commencement of the bankruptcy, any property is acquired by, or devolves on, the bankrupt or there is an increase of the bankrupt's income, the bankrupt must, within the prescribed period, give the trustee notice of the property or, as the case may be, of the increase: Insolvency Act 1986 s 333(2). The trustee may by notice in writing claim for the bankrupt's estate any property which has been acquired by, or devolved on, the bankrupt since the commencement of the bankruptcy (see s 307(1); and para 445 et seq post) or may apply to the court for an income payments order (see s 310 (as amended); and para 449 et seq post).

#### **UPDATE**

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(ii) Property Available to the Trustee/403. Expectancies.

#### **403. Expectancies.**

A mere expectancy or possibility of an interest is not property<sup>1</sup>, and, if it remains a possibility or expectancy while the bankruptcy lasts, it does not become divisible among the creditors; but, if it becomes an actual interest<sup>2</sup> during the bankruptcy, it is divisible among the creditors, if claimed by the trustee<sup>3</sup>.

A possibility coupled with an interest passes on bankruptcy<sup>4</sup>.

1 For the meaning of 'property' see para 400 ante.

2 *Johnson v Smiley* (1853) 17 Beav 223 at 230; *Re Inkson's Trusts* (1855) 21 Beav 310; *Re Duggan's Trusts* (1869) LR 8 Eq 697. A mere possibility, such as a presumptive title to an equitable estate tail or as next of kin, does not pass to the trustee: *Carleton v Leighton* (1805) 3 Mer 667; *Re Parsons, Stockley v Parsons* (1890) 45 ChD 51 (disapproving *Re Beaupré's Trusts* (1888) 21 LR 1r 397), applied in *Re Middleton's Will Trusts, Whitehead v Earl of Middleton* [1969] 1 Ch 600, [1967] 2 All ER 834. The possibility that a pecuniary benefit may accrue to the bankrupt by another person exercising in his favour an option which is only exercisable on a contingency does not pass on bankruptcy: *Re Suse and Sibeth, ex p Dever* (1887) 18 QBD 660, CA. An option which a bankrupt may exercise does pass: *Re Suse and Sibeth, ex p Dever* supra at 668; and see *Buckland v Papillon* (1866) 2 Ch App 67. If property is limited in trust for the members of a named class (eg the children of A and B) as another person shall appoint, and in default of appointment to all the members of the class, and one of the members of the class becomes bankrupt before any appointment is made, his interest is a mere possibility, and does not pass on bankruptcy: *Re Vizard's Trusts* (1866) 1 Ch App 588. If, in a limitation of this kind, an appointment is made by will, no member of the class has any property in the appointed share until the appointor's death; and, if one of the members of the class becomes bankrupt and obtains his discharge before the appointor's death, no interest passes to his creditors, except when the object of the appointment is only to fix the proportion which each member of the class should take: *Duke of Marlborough v Lord Godolphin* (1750) 2 Ves Sen 61; cf *Re Silber's Settlement, Public Trustee v Silber* [1920] WN 77. As to the nature of a mere expectancy or spes successionis see REAL PROPERTY vol 39(2) (Reissue) para 183; and as to the extent to which such an expectancy is assignable see CHOSSES IN ACTION vol 13 (2009) PARA 13 et seq.

Where there is a pending application to the Criminal Injuries Compensation Authority, the possibility of obtaining compensation does not vest in the trustee as there is no right to enforce an award: *Re Campbell (a bankrupt)* [1997] Ch 14, [1996] 2 All ER 537.

3 As to claiming after-acquired property see para 446 post.

4 Thus, where property is settled in trust for a tenant for life, and on his death to be divided among such of his children as should be living at his death, and one of the children becomes bankrupt before the death of the tenant for life, his interest in remainder passes on bankruptcy: *Higden v Williamson* (1732) 3 P Wms 132. If an income for life is given to a person then bankrupt to be paid to him on his obtaining his discharge, this is a contingent interest which vests in the trustee, and on the bankrupt obtaining his discharge vests in the trustee absolutely: *Davidson v Chalmers, Perry v Chalmers* (1864) 33 LJ Ch 622.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **404. Property over which bankrupt has power of disposition.**

A general power of appointment over property is not, strictly speaking, property<sup>1</sup>; but, if it is exercisable by deed, it is within the extended meaning in which the term 'property' is used in the Insolvency Act 1986 in determining what property of the bankrupt is comprised in the bankrupt's estate<sup>2</sup>; such a power may be exercised by the trustee for the creditors' benefit so long as the bankrupt is living<sup>3</sup>. A general power of appointment which is exercisable by will only

is not 'property' within the 1986 Act<sup>4</sup>; nor is a special power of appointment which is exercisable for the joint benefit of the bankrupt and another<sup>5</sup>.

If a person who has an interest defeasible by virtue of an appointment by himself becomes bankrupt, he cannot thereafter exercise the power so as to deprive the trustee in bankruptcy of the interest which has already vested in the trustee<sup>6</sup>; but, if an interest is defeasible by virtue of an appointment by a third person, it seems that the trustee's interest may be defeated by such an appointment<sup>7</sup>.

The capacity to release a special power of appointment does not, it seems, pass to the trustee in bankruptcy of the donee of the power<sup>8</sup>.

A power of the beneficiary under a trust instrument to consent to a sale or lease of the trust property, or to the exercise of a power of advancement, is not extinguished by bankruptcy; but, as the exercise of the power may affect the interest of the trustee in bankruptcy, his sanction is necessary to the giving of consent<sup>9</sup>. If a power exercisable by the bankrupt is of such a nature that its exercise will not affect the trustee's interest, as, for example, where it is a power to appoint new trustees of the instrument, the trustee's consent is not necessary<sup>10</sup>.

In the case of settled land, however, the statutory powers of the tenant for life are not assignable and remain exercisable by him despite bankruptcy<sup>11</sup> without his trustee in bankruptcy's consent to their exercise being required<sup>12</sup>; but the trustee is entitled to notice of any intended transaction<sup>13</sup>. Similarly, any additional or larger powers conferred on the tenant for life by the settlor appear to be exercisable without consent<sup>14</sup>.

The protector of a settlement who becomes bankrupt remains protector after bankruptcy<sup>15</sup>.

A right to a grant of administration to the estate of an intestate is not a right which passes to a trustee in bankruptcy<sup>16</sup>; but the court may in its discretion<sup>17</sup> make a grant to the trustee<sup>18</sup>.

1 *Nichols to Nixey* (1885) 29 ChD 1005; *Re Armstrong, ex p Gilchrist* (1886) 17 QBD 521 at 527, 529, 531. For the meaning of 'property' see para 400 ante.

2 See the Insolvency Act 1986 s 283(4); and para 400 ante.

3 *Nichols to Nixey* (1885) 29 ChD 1005.

4 *Re Guedalla, Lee v Guedalla's Trustee* [1905] 2 Ch 331; *Re Benzon, Bower v Chetwynd* [1914] 2 Ch 68, CA. In the earlier of these cases, it was further held that, although the bankrupt was undischarged at the date of his death, the creditors in the bankruptcy were precluded by what became the Bankruptcy Act 1914 s 7 (now in effect the Insolvency Act 1986 s 285(1): see para 218 ante), from claiming against the appointed fund in the administration of his estate; but in the later case this point was left undecided. If the bankrupt dies after obtaining his discharge, the creditors in the bankruptcy cannot claim in the administration of his estate: *Jenney v Andrews* (1822) 6 Madd 264.

5 *Re Taylor's Settlement Trusts, Public Trustee v Taylor* [1929] 1 Ch 435. Such a power cannot be exercised by the bankrupt 'for his benefit' within the meaning of the Insolvency Act 1986 s 283(4)(b) (see para 400 head (2) ante); *Re Taylor's Settlement Trusts, Public Trustee v Taylor* supra. As to the effect of bankruptcy on the right to exercise a power of appointment see *Jones v Winwood* (1841) 10 Sim 150; *Haswell v Haswell* (1860) 2 De GF & J 456; *Wickham v Wing* (1865) 2 Hem & M 436; *Re Aylwin's Trusts* (1873) LR 16 Eq 585; and POWERS vol 36(2) (Reissue) para 380.

6 *Hole v Escott* (1838) 4 My & Cr 187; *Doe d Coleman v Britain* (1818) 2 B & Ald 93; *Badham v Mee* (1831) 7 Bing 695; *Badham v Mee* (1832) 1 My & K 32 at 34; *Re Cooper, Cooper v Slight* (1884) 27 ChD 565 at 569. See also *Dunlop v Johnston* (1867) LR 1 Sc & Div 109, HL (post-nuptial settlement, revocable by Scottish law, made in favour of wife by man who afterwards became bankrupt).

7 *Lee v Olding* (1856) 25 LJ Ch 580 (defeasible interest in half of fund; whole fund appointed to bankrupt after his discharge); and see *Re Vizard's Trusts* (1866) 1 Ch App 588.

8 It was so held in *Re Rose, Rose v Rose* [1904] 2 Ch 348, but the point was left undecided on appeal: see *Re Rose, Hasluck v Rose* [1905] 1 Ch 94, CA.

9 *Re Cooper, Cooper v Slight* (1884) 27 ChD 565 (power to consent to advancement); *Re Bedingfield and Herring's Contract* [1893] 2 Ch 332 (power to consent to sale); cf *Simpson v Bathurst, Shepherd v Bathurst* (1869) 5 Ch App 193 (power to renew leases).

10 *Hardaker v Moorhouse* (1884) 26 ChD 417.

11 See the Settled Land Act 1925 s 104(1); SETTLEMENTS vol 42 (Reissue) para 777; *Re Mansel's Settled Estates* [1884] WN 209; *Re Marquis of Ailesbury's Settled Estates* [1892] 1 Ch 506 at 535. The court may, however, under the Settled Land Act 1925 s 24 (see SETTLEMENTS vol 42 (Reissue) para 765), empower the trustees of the settlement to exercise the powers in the name and on behalf of the tenant for life: see *Re Thornhill's Settlement* [1941] Ch 24, [1940] 4 All ER 249, CA (where the trustee in bankruptcy obtained such an order).

The prohibition against assignment applies to a person having the powers of a tenant for life under the Settled Land Act 1925 s 20 (as amended) (see SETTLEMENTS vol 42 (Reissue) para 762), but not to a mere statutory owner under s 23 (see SETTLEMENTS vol 42 (Reissue) para 766): *Re Craven Settled Estates* [1926] Ch 985. The legal estate in settled land does not vest in the trustee in bankruptcy of an estate owner until the estate owner becomes absolutely and beneficially entitled: see para 429 post.

Since 1 January 1997 it has not been possible to create settlements for the purposes of the Settled Land Act 1925, save in a very limited class of cases: see SETTLEMENTS vol 42 (Reissue) paras 606, 675 et seq.

12 See *ibid* s 104(4) (as amended), (10); and SETTLEMENTS vol 42 (Reissue) para 779.

13 See *ibid* s 104(4) proviso (c); and SETTLEMENTS vol 42 (Reissue) para 779. The trustee has the same or a similar interest in land, money or securities for the time being representing the bankrupt's interest as he had by virtue of the bankruptcy in the land, money or securities then representing the bankrupt's interest: see s 104(4) proviso (a); and SETTLEMENTS vol 42 (Reissue) para 779. After notice of the bankruptcy to the trustees of the settlement, the consent of the assignee is required to an investment of capital money for the time being affected by the assignment in investments other than securities, and to any application of any such capital money: see s 104(4) proviso (b) (amended by the Trustee Act 2000 s 40(1), (3), Sch 2 para 16(1), Sch 4 Pt II); and SETTLEMENTS vol 42 (Reissue) para 779.

14 See *ibid* s 109; and SETTLEMENTS vol 42 (Reissue) para 880.

15 See the Fines and Recoveries Act 1833 s 22; and REAL PROPERTY vol 39(2) (Reissue) para 124.

16 *Re Turner's Goods* (1886) 12 PD 18.

17 *Re* under the Supreme Court Act 1981 s 116: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 180.

18 *Re Turner's Goods* (1886) 12 PD 18; *Re Thacker's Goods* (1890) 54 JP 759; *Re Bowron's Goods* (1914) 84 LJP 92; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 162; Tristram and Coote's Probate Practice (29th Edn, 2002) paras 5.222-5.225.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **404 Property over which bankrupt has power of disposition**

NOTE 17--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).



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#### **405. Interests determinable on bankruptcy.**

An interest in property, determinable and passing away to another person on the possessor's bankruptcy, does not become divisible among the bankrupt's creditors, if the settlor or person creating the interest is someone other than the bankrupt<sup>1</sup>.

The rule is that the owner of property may, on alienation, qualify the interest of his alienee by a condition to take effect on the alienee's bankruptcy; but he cannot, by contract or otherwise, qualify his own interest by a similar condition, determining or controlling it in the event of his own bankruptcy to the disappointment or delay of his creditors<sup>2</sup>. Accordingly, by the use of apt words of limitation, where property is granted by one person to another in such a way that the interest granted determines on the grantee's bankruptcy and passes away to someone else, the property is not divisible among the grantee's creditors on his bankruptcy<sup>3</sup>. The instrument creating the interest must, however, use proper words of limitation to ensure that it does pass away from him in the event of his bankruptcy; otherwise his interest, whatever it may be, will be divisible among his creditors<sup>4</sup>.

A person's rights under a personal pension scheme cannot be forfeited by reference to his bankruptcy<sup>5</sup>.

1 *Re Ashby, ex p Wreford* [1892] 1 QB 872; *Roe d Hunter v Galliers* (1787) 2 Term Rep 133. As to the construction of clauses providing for determination of an interest on bankruptcy or insolvency see *Lear v Leggett* (1829) 2 Sim 479; *Re Muggeridge's Trusts* (1860) John 625; *Freeman v Bowen* (1865) 35 Beav 17; *Montefiore v Enthoven* (1867) LR 5 Eq 35; *Billson v Crofts* (1873) LR 15 Eq 314; *Re Walker, ex p Gould* (1884) 13 QBD 454; *Nixon v Verry* (1885) 29 ChD 196; *Re Harvey, ex p Pixley v Harvey* (1889) 6 Morr 95; *Re Carew, Carew v Carew* [1896] 2 Ch 311, CA; *Re Weibking, ex p Ward* [1902] 1 KB 713; *Re Cooper, Townend v Townend* (1917) 86 LJ Ch 507.

Under the Bankruptcy Act 1914 (repealed) the interest determined when the act of bankruptcy was committed, that being the date on which the bankruptcy was deemed to commence. Under the Insolvency Act 1986 the bankruptcy of an individual against whom a bankruptcy order has been made commences with the day on which the order is made: see s 278(a); and para 213 head (1) ante.

2 *Mackintosh v Pogose* [1895] 1 Ch 505 at 511-514; *Wilson v Greenwood* (1818) 1 Swan 471. A forfeiture clause which is attached to an absolute vested gift may be void for repugnancy: see *Re Smith, Smith v Smith* [1916] 1 Ch 369 (where a forfeiture clause which applied both to vested and to contingent gifts was held not to be capable of being split up so as to be valid as to the contingent gifts, but to be wholly void). A forfeiture clause purporting to forfeit an absolute interest in possession in the event of alienation will be void as will be such a clause which purports similarly to forfeit a life or other limited interest in possession which is not, on the true construction of the instrument creating it, made determinable in the same events as those in which the forfeiture is expressed to operate, but there is nothing objectionable about such a forfeiture clause which purports to defeat a future interest in the event of purported alienation before it falls into possession or to create a gift over in the event in which an income interest in possession is, on the true construction of the trust instrument, expressed to be determinable; and, if a forfeiture clause purports to apply both to interests in possession and to future or determinable interests, it will be wholly void, even as to future or determinable interests, as to which it would have been valid if limited to interests within that class: *Re Scientific Investment Pension Plan Trusts* [1999] Ch 53, [1998] 3 All ER 154 (scheme trust deed did not vest an absolute interest in pension benefits in scheme members with the result that provision forfeiting members' entitlement in event of assignment or alienation terminated interests in possession under the scheme on bankruptcy and future interests (namely where the member had not reached retirement age) were subject to forfeiture on bankruptcy). Cf *Caboche v Ramsay, Bond v Ramsay* [1997] BPIR 377. See further text and note 5 infra. As to what interests may validly be made subject to forfeiture clauses see GIFTS.

3 *Rochford v Hackman* (1852) 9 Hare 475. Property cannot, however, be given to a person in such a way that it should go to him, when and as soon as he should be able to enjoy it for his own use and benefit, so as not to be subject to his debts: *Davidson v Chalmers, Perry v Chalmers* (1864) 33 LJ Ch 622.

4 *Brandon v Robinson* (1811) 1 Rose 197 (where a testator gave a fund to trustees on trust to pay the dividends into his son's hands, or to his order or receipt, to the intent that the same or any part of it should not be grantable or assignable by way of anticipation, but there was no gift over, and it was held that on the son's bankruptcy his interest passed to his creditors); *Graves v Dolphin* (1826) 1 Sim 66 (where an annuity, given to a person for his personal maintenance and support, which was not to be liable to his debts and was to be paid into his own hands and not to any other person, but in respect of which there was no gift over, was held not to be determinable on bankruptcy and passed to the annuitant's creditors). In *Bird v Johnson* (1854) 18 Jur 976, there was a proviso that, in the event of the grantee of an absolute interest becoming bankrupt before his interest became payable to him, so as to deprive him of the interest intended to be vested in or payable to him, it should cease and determine as if he were then dead; and it was held that, there being no sufficient limitation over and the condition being repugnant and void, there was no forfeiture on bankruptcy, though there would have been if the interest given had been for life alone.

5 See the Pension Schemes Act 1993 s 159A(1), (2) (added by the Welfare Reform and Pensions Act 1999 s 14(1)); and SOCIAL SECURITY AND PENSIONS. As to forfeiture of rights under occupational pension schemes see the Pensions Act 1995 s 92(2) (amended by the Welfare Reform and Pensions Act 1999 ss 14(3), 88, Sch 13 Pt I); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 866. The Welfare Reform and Pensions Act 1999 s 14 came into force on 6 April 2002: see the Welfare Reform and Pensions Act 1999 (Commencement No 13) Order 2002, SI 2002/153, art 2(d).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **406. Interests determinable on alienation generally.**

Where the event of bankruptcy is not specifically referred to, a gift over of a life estate, in the event of the grantee alienating or charging his interest, may be so expressed as to effect a forfeiture of the life interest, or bring it to an end, on his bankruptcy<sup>1</sup>, or as to take effect only if income is in the trustee's hands at the time<sup>2</sup>, or as not to be effective on his bankruptcy<sup>3</sup>. However, a mere restriction against alienation in a gift or contract will not be effective to prevent the property from vesting, subject to the restriction, in the trustee<sup>4</sup>.

1 *Re Cotgrave, Mynors v Cotgrave* [1903] 2 Ch 705 (gift over on 'alienating or incumbering or agreeing to alienate or incumber'); *Re Loftus-Otway, Otway v Otway* [1895] 2 Ch 235 ('liable to be deprived of beneficial enjoyment'); *Metcalfe v Metcalfe* [1891] 3 Ch 1, CA (forfeiture and gift over, if interest 'aliened, whereby the same would vest in any other person'); *Re Throckmorton, ex p Eyston* (1877) 7 ChD 145, CA (annuity to cease if donee did or permitted any act, deed, matter or thing, whereby the same should be aliened, charged or incumbered). See also *Re Parnham's Trusts* (1872) LR 13 Eq 413 (annulment of bankruptcy); *Re Amherst's Trusts* (1872) LR 13 Eq 464; *Rochford v Hackman* (1852) 9 Hare 475; *Cooper v Wyatt* (1821) 5 Madd 482; *Shee v Hale* (1807) 13 Ves 404; *Dommett v Bedford* (1796) 3 Ves 149.

2 *Re Laye, Turnbull v Laye* [1913] 1 Ch 298 (gift until grantee should do or suffer something, whereby the income or part of it, if belonging to him absolutely, 'becomes payable to some other person'), explaining *Re Sartoris's Estate, Sartoris v Sartoris* [1892] 1 Ch 11, CA. See also *Re Richardson's Will Trusts, Public Trustee v Llewellyn Evans' Trustee* [1958] Ch 504, [1958] 1 All ER 538 (order to secure divorce maintenance creating, or attempting to create, equitable charge on a protected interest effected a forfeiture).

3 *Re Laye, Turnbull v Laye* [1913] 1 Ch 298 ('have his affairs liquidated by arrangement or composition'; scheme for payment in full not such a liquidation). So, also, in *Re Parnham's Trust* (1876) 46 LJ Ch 80, a bankruptcy during a prior life interest, annulled during the continuance of that life interest, did not effect a forfeiture. In *Lear v Leggett* (1830) 1 Russ & M 690, where the proviso was that the life estate should not be subject to any alienation or disposition by sale, mortgage or otherwise, and if the tenant for life should charge or attempt to charge his interest, any such mortgage, sale or other disposition should be a forfeiture, it was held that the proviso did not apply to the case of alienation by an involuntary act such as bankruptcy then was, and that the life estate was not forfeited on bankruptcy.

In *Re Moon, ex p Dawes* (1886) 17 QBD 275, CA, where a gift over was to take place if the grantee should assign, charge or otherwise dispose of the income or become bankrupt or do or suffer anything whereby the income, if payable to him absolutely, or any part of it would become vested in any other person, the mere act of the filing of a bankruptcy petition by the grantee did not operate as a forfeiture; in fact no bankruptcy followed, and the income would never have been 'vested' in any other person, if the income had been payable to the grantee absolutely; the limitations differ from those in *Re Sartoris's Estate, Sartoris v Sartoris* [1892] 1 Ch 11, CA, and *Re Loftus-Otway, Otway v Otway* [1895] 2 Ch 235 (cf *Re James, Clutterbuck v James* (1890) 62 LT 454).

In *Re Harvey, ex p Pixley v Harvey* (1889) 6 Morr 95, a gift over of an annuity, in the event of the annuitant alienating, charging, incumbering or disposing of it, was held not to apply to his being adjudicated bankrupt on a creditor's petition; but contrast *Rochford v Hackman* (1852) 9 Hare 475, and *Re Amherst's Trusts* (1872) LR 13 Eq 464. In *Re Evans, Public Trustee v Evans* [1920] 2 Ch 304, CA, it was held that the words 'unless he attempts to become bankrupt' must be read in their strict grammatical sense, and as so read did not apply to a bankruptcy against his will or bankruptcy generally.

In *Re Hamilton, FitzGeorge v FitzGeorge* (1921) 124 LT 737, CA, where the proviso was that the beneficiary should not do or suffer any act whereby his share of income would be assigned, an authority to the trustees of the will to pay the income over to a trustee under a scheme of composition, not communicated to the trustee of the scheme, was held not to be a good assignment, but merely a bare authority revocable by the beneficiary. In *Re Griffiths, Jones v Jenkins* [1926] Ch 1007, where there was a gift over in the event of the grantee anticipating, charging, assigning or otherwise disposing of the income, it was held that a bankruptcy petition presented by the grantee did not operate as a forfeiture; and *Re Cotgrave, Mynors v Cotgrave* [1903] 2 Ch 705 (cited in note 1 supra) was doubted but distinguished.

4 *Krasner v Dennison, Lawrence v Lesser* [2001] Ch 76, [2000] 3 All ER 234, CA; and see para 405 text and notes 2, 4, 5 ante.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **407. Forfeiture in case of foreign bankruptcies.**

The foreign bankruptcy of an individual domiciled in England may not work a forfeiture<sup>1</sup>; but personal estate in England<sup>2</sup>, though not real estate<sup>3</sup>, may pass to the assignee in his foreign bankruptcy.

1 *Re Hayward, Hayward v Hayward* [1897] 1 Ch 905 (life interest in English personalty determinable on bankruptcy; New Zealand bankruptcy of an individual domiciled in England; adjudication subsequently annulled; assignee not entitled); *Re James, Clutterbuck v James* (1890) 62 LT 454 (determinable life interest in personalty; sequestration of legatee's estate in Scotland, subsequently recalled; no forfeiture); cf *Re Aylwin's Trusts* (1873) LR 16 Eq 585 (determinable life interest in leaseholds; Australian bankruptcy of life tenant; forfeiture incurred); *Re Levy's Trusts* (1885) 30 ChD 119 (determinable life interest in rents and profits of real estate in England; adjudication in New South Wales; forfeiture incurred); *Bergerem v Marsh* (1921) 91 LJB 80 (Belgian bankruptcy of an individual domiciled in England; personalty in England vested in Belgian trustee).

2 *Re Anderson, ex p New Zealand Official Assignee* [1911] 1 KB 896 (reversionary interest in personalty in income; individual domiciled in England made bankrupt in New Zealand and subsequently in England; New Zealand assignee entitled); *Re Craig, Catling v Esson* (1916) 86 LJ Ch 62 (reversionary interest; adjudication in Western Australia; assignees of trustee in bankruptcy entitled, without inquiry as to bankrupt's domicile); *Re Lawson's Trusts* [1896] 1 Ch 175 (fund in court paid to official assignee of deceased bankrupt in Bombay without administration in England); *Re Burke, King v Terry* (1919) 54 L Jo 430 (assets of estate of deceased debtor to be handed over to syndic in French bankruptcy after deducting costs of administration proceedings); and see *Re Davidson's Settlement Trusts* (1873) LR 15 Eq 383; *Re Blithman* (1866) LR 2 Eq 23.

3 *Waite v Bingley* (1882) 21 ChD 674 (bankruptcy in Australia; legal estate in land in England did not vest in assignee). As to the court's power to assist the courts of other jurisdictions in relation to insolvency proceedings see paras 728, 729 post.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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### **408. Construction of forfeiture clauses.**

In the construction of wills and settlements providing for the determination of a grantee's interest in the event of his bankruptcy, the court, for the sake of giving effect to the testator's or settlor's intention that property should not pass into hands other than those which the testator or settlor intended, has construed the clauses creating the limitation over in the event of bankruptcy in such a way as to apply them to a bankruptcy already existing, either at the date of the will or the settlement or at the time when the grantee's interest would, but for the bankruptcy, have fallen into his possession<sup>1</sup>.

However, it appears to be well settled that, if a bankruptcy is annulled between the time when the title to a fund accrues to the bankrupt and the time when it would have become payable to him but for the bankruptcy, the bankrupt is in the same position as if he had never been bankrupt, and is entitled to receive the fund, if it has not been intercepted in the meantime<sup>2</sup>.

1 *Manning v Chambers* (1847) 1 De G & Sm 282; *Seymour v Lucas* (1860) 1 Drew & Sm 177; *Trappes v Meredith* (1871) 7 Ch App 248; *Re Akeroyd's Settlement, Roberts v Akeroyd* [1893] 3 Ch 363, CA; *Re Evans, Public Trustee v Evans* [1920] 2 Ch 304, CA (applied in *Re Walker, Public Trustee v Walker* [1939] Ch 974, [1939] 3 All ER 902 (where the bankrupt obtained his discharge after the testator's death but before the annuity became first payable; and it was held that the forfeiture clause prevented the vesting of the annuity in the bankrupt)).

Where there is a trust of a fund under the terms of which the trustees are bound to apply the income of the fund in a particular way on a given future contingency, the person who takes the income as a result of that trust on the happening of the contingency is a person who has an interest of a kind which, but for the forfeiture clause, is capable of vesting in his trustee in bankruptcy: *Re Clark, Clark v Clark* [1926] Ch 833 at 838. A conditional discharge on the bankrupt paying a sum of money does not terminate the operation of the forfeiture, if the money is not in fact paid: *Re Clark, Clark v Clark* supra.

2 Thus, in *White v Chitty* (1866) LR 1 Eq 372; *Lloyd v Lloyd* (1866) LR 2 Eq 722; *Robins v Rose* (1874) 43 LJ Ch 334; *Re Parnham's Trust* (1876) 46 LJ Ch 80; *Ancona v Waddell* (1878) 10 ChD 157, it was held that no forfeiture had taken place because the income had not been payable before the annulment of the bankruptcy. However, in *Sharp v Cosserat* (1855) 20 Beav 470; *Re Parnham's Trusts* (1872) LR 13 Eq 413; *Robertson v Richardson* (1885) 30 ChD 623; *Re Broughton, Peat v Broughton* (1887) 57 LT 8; *Metcalfe v Metcalfe* [1891] 3 Ch 1, CA; *Re Forder, Forder v Forder* [1927] 2 Ch 291, CA, it was held that a forfeiture had taken place because the income became payable before the annulment. See, however, *Samuel v Samuel* (1879) 12 ChD 152; *Re James, Clutterbuck v James* (1890) 62 LT 454.

## UPDATE

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#### **409. Conditions for forfeiture on settlor's bankruptcy.**

No one may deal with his own property in such a way as to provide that, in the event of bankruptcy, it is to be distributed differently from the way the law prescribes<sup>1</sup>. This principle applies not only to a voluntary disposition which may be avoided if made with intent to defraud creditors<sup>2</sup>, but also to a marriage settlement and any other contract for valuable consideration.

Thus, no one possessed of property may reserve that property to himself, until he should become bankrupt, and provide that on his bankruptcy it should pass to someone other than his creditors<sup>3</sup>. A provision in a marriage settlement or other disposition, by which a life interest determinable on bankruptcy is reserved to the owner, is ineffective as against the settlor's trustee in bankruptcy, so far as relates to the determination on bankruptcy; on the bankruptcy of the settlor his life interest will pass to his creditors<sup>4</sup>. If a settlor settles property on himself, until he shall assign, charge or incur it, and assigns or charges the property before the bankruptcy, the limitation over will take effect, and will not be avoided by a subsequent bankruptcy; but, in the event of bankruptcy prior to an assignment or charge, the limitation over will not take effect<sup>5</sup>.

Where a person who becomes bankrupt has been a party to a settlement which covers his own property and the property of another, and the settlement contains a provision terminating the life interest of the person who becomes bankrupt on his bankruptcy, that life interest will be realisable by the trustee in bankruptcy to the extent of the bankrupt's own property; but the limitation over on bankruptcy will be valid to the extent of the other person's property<sup>6</sup>.

A court order varying a marriage settlement consequent on the dissolution of the marriage, whereby a settlor's interest is diminished, is not in itself an 'event' effecting a forfeiture of that interest<sup>7</sup>.

1 *Re Jeavons, ex p Mackay, ex p Brown* (1873) 8 Ch App 643 at 647 (patentee sold the patent to manufacturers in return for royalties and was at the same time given a loan by the manufacturers on terms that they were entitled to retain one-half of the royalties towards repayment of a loan with a promise that, if he became bankrupt, they could retain the whole of the loan; the provision was held to be a fraud on the bankruptcy laws); and see *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL.

2 Under the Insolvency Act 1986 ss 423-425: see para 663 et seq post. See *Freeman v Pope* (1870) 5 Ch App 538; *Re Wise, ex p Mercer* (1886) 17 QBD 290, CA; *Re Holland, Gregg v Holland* [1902] 2 Ch 360, CA (overruling *Re Pearson, ex p Stephens* (1876) 3 ChD 807); *Re Baker* [1936] Ch 61 (where a deed was held not to be impeachable either under the Law of Property Act 1925 s 172 (repealed) or under the Bankruptcy Act 1914 s 42 (repealed) (see now the Insolvency Act 1986 ss 423-425 and s 339 respectively)); *Re Eichholz, Eichholz's Trustee v Eichholz* [1959] Ch 708, [1959] 1 All ER 166. As to the avoidance of transactions at an undervalue see para 653 et seq post; and as to the avoidance of voluntary dispositions made with the intent to defraud creditors see para 663 et seq post.

3 *Whitmore v Mason* (1861) 2 John & H 204. See also *Casey's Trusts* (1855) 4 I Ch R 247. A resettlement by the bankrupt and another person, in exercise of a joint power of appointment, of property in which a bankrupt had an interest in default of appointment, is not a settlement of the bankrupt's own property for this purpose: *Re Ashby, ex p Wreford* [1892] 1 QB 872. A settlement of damages which a bankrupt recovered against a co-respondent for adultery (before the abolition of such damages by the Law Reform (Miscellaneous Provisions) Act 1970 s 7) was not a settlement of the bankrupt's own property: *Re Stephenson, ex p Brown* [1897] 1 QB 638.

4 *Higinbotham v Holme* (1812) 19 Ves 88; *Re Brewer's Settlement, Morton v Blackmore* [1896] 2 Ch 503. See also *Re Burroughs-Fowler, Burroughs-Fowler's Trustee v Burroughs-Fowler* [1916] 2 Ch 251 (where it was held that the bankrupt's life interest vested indefeasibly in his trustee in bankruptcy and was no longer capable of being affected by any subsequent act of forfeiture by the bankrupt, and that the trustee could make a good title to the income of the settled property during the remainder of the bankrupt's life); *Re Winwood's Settlement, Fisher v Winwood's Trustee* (1916) 85 LJ Ch 799 (where the settlement conferred on the bankrupt a life interest in property settled by himself and a determinable interest in property settled by his father, and an annual sum directed to be held on the same trusts as the income of the settlement fund was apportioned); *Re Wombwell* (1921) 125 LT 437 (where the forfeiture clause in a settlement of property, belonging partly to the bankrupt and partly to a third party, was held void only to the extent of the bankrupt's property). If a settlement providing for the forfeiture of the settlor's life interest in the event of his bankruptcy is set aside as fraudulent under the Insolvency Act 1986 ss 423-425 (see para 653 et seq post), the bankruptcy of the settlor may nonetheless, as against himself and those claiming under a second bankruptcy, operate as a forfeiture of his life interest: *Re Johnson Johnson, ex p Matthews and Wilkinson v Johnson Johnson and Dibb* [1904] 1 KB 134, DC.

5 *Brooke v Pearson* (1859) 27 Beav 181; *Knight v Browne* (1861) 30 LJ Ch 649; *Re Detmold, Detmold v Detmold* (1889) 40 ChD 585; *Re Brewer's Settlement, Morton v Blackmore* [1896] 2 Ch 503; and see *Re Carew's Trusts, Gellibrand v Carew* (1910) 103 LT 658 (overruled, in so far as it decided that an order varying a marriage settlement, brought about a forfeiture: see the text and note 7 infra). A limitation over in the event of an alienation is valid, if there is an involuntary alienation by process of law in favour of a judgment creditor, but not where the involuntary alienation takes place by virtue of bankruptcy: see *Re Detmold, Detmold v Detmold* supra. Such a limitation over would not take effect on the assignment of the settlor's property for the benefit of his creditors generally: see *Re Detmold, Detmold v Detmold* supra at 588. See also *Re Balfour's Settlement, Public Trustee v Official Receiver* [1938] Ch 928, [1938] 3 All ER 259 (trustees having, before the bankruptcy, impounded to make good a breach of trust, nothing passed to the trustee in bankruptcy).

6 *Lester v Garland* (1832) 5 Sim 205; *Mackintosh v Pogose* [1895] 1 Ch 505; *Doherty v Power* [1916] 1 IR 337; *Re Wombwell* (1921) 125 LT 437.

7 *General Accident Fire and Life Assurance Corp'n Ltd v IRC* [1963] 3 All ER 259, [1963] 1 WLR 1207, CA (a decision on the application of the Trustee Act 1925 s 33(1)), overruling *Re Carew's Trusts, Gellibrand v Carew* (1910) 103 LT 658.

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#### **410. Condition impossible to perform because of bankruptcy.**

If, at the time of his bankruptcy, the bankrupt is entitled in possession or remainder, under a will or settlement, to an interest in premises which is subject to forfeiture on the breach of a condition, which would be broken if the interest were realised by the trustee in bankruptcy, for example, a condition that the person entitled to the use of the premises under the will or settlement should reside there, the interest none the less passes to the trustee, and it seems that on bankruptcy such a condition would cease to operate<sup>1</sup>.

<sup>1</sup> *Re Goldney, ex p Goldney* (1839) Mont & Ch 75.

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#### **411. Leaseholds.**

Unless disclaimed by the trustee<sup>1</sup>, the bankrupt's leasehold property passes to the trustee subject to the landlord's rights as to rent and to the enforcement of the covenants<sup>2</sup> which bind assigns, except those which are not enforceable against a tenant's trustee in bankruptcy, such as the covenant not to assign without the landlord's consent<sup>3</sup>.

The bankrupt's property is also subject to rights of distress and to any rights of seizure which have been validly created in respect of it<sup>4</sup>.

<sup>1</sup> See para 481 post.

<sup>2</sup> See *Re Solomon, ex p Dressler* (1878) 9 ChD 252, CA; *Wilson v Wallani* (1880) 5 ExD 155; *Titterton v Cooper* (1882) 9 QBD 473, CA; *Wilkins v Fry* (1816) 1 Mer 244 at 265. As to the landlord's right to distrain after

bankruptcy see para 688 post; as to a mortgagee's right to stand in the landlord's place when distress has been levied on goods forming part of the mortgagee's security, and also on goods not forming part, see *Re Stephenson, ex p Stephenson* (1847) De G 586. As regards fixtures on demised premises, as between the landlord and the tenant's trustee in bankruptcy, the trustee is in the tenant's shoes, and is prima facie entitled to the tenant's or trade fixtures: *Stansfeld v Portsmouth Corpn* (1858) 27 LJCP 124; *Pugh v Arton* (1869) LR 8 Eq 626; *Re Walker, ex p Gould* (1884) 13 QBD 454; *Lambourn v McLellan* [1903] 2 Ch 268, CA. As regards farming leases see AGRICULTURAL LAND vol 1 (2008) PARA 301 et seq.

The right of a tenant to remain in occupation after the expiry of a lease by effluxion of time pursuant to the Landlord and Tenant Act 1954 Pt 1 (ss 1-22) (as amended) (see LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 1196 et seq) constitutes property which vests in a trustee: *De Rothschild v Bell (a bankrupt)* [2000] QB 33, [1999] 2 All ER 722, CA.

A statutory tenant under the Rent Acts has a personal right only and, therefore, a statutory tenancy is not 'property' within the meaning of the Insolvency Act 1986 s 436 (see para 400 ante), and does not pass to the trustee: *Sutton v Dorf* [1932] 2 KB 304, applied in *Smith v Odder* [1949] WN 249, CA. If a lease of a dwelling house has become vested in the tenant's trustee in bankruptcy, the tenant does not become a statutory tenant on the expiration of the lease (*Stafford v Levy* [1946] 2 All ER 256, CA), or on disclaimer by the trustee (see para 481 post). Where the trustee has disclaimed property under the Insolvency Act 1986 s 315 (as amended) (see para 472 post) and the disclaimed property is property in a dwelling house, the court may, on the application of any person who at the time when the bankruptcy petition was presented was in occupation of or entitled to occupy the dwelling house, make an order on such terms as it thinks fit for the vesting of the disclaimed property in any such person: see s 320(1), (2)(c), (3)(c); and para 485 heads (3), (c) respectively post. Where a lease creating a protected tenancy for the purposes of the Rent Act 1977 provided for re-entry on the tenant's bankruptcy and the tenant became bankrupt after becoming a statutory tenant, the bankruptcy was a breach or non-performance of an obligation of the previous protected tenancy which was applicable to the statutory tenancy: *Cadogan Estates Ltd v McMahon* [2001] BPIR 17, HL.

As to tenancies controlled by statute see the Insolvency Act 1986 s 283(3A) (as added); and para 216 heads (e)-(h) ante.

3 See para 414 post.

4 *Krehl v Great Central Gas Co* (1870) LR 5 Exch 289; *Re Garrud, ex p Newitt* (1881) 16 ChD 522, CA; *Leman v Yorkshire Rly Waggon Co* (1881) 50 LJ Ch 293. As to a landlord's rights in respect of distress see para 686 et seq post.

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#### **412. Forfeiture of lease on bankruptcy.**

A proviso in a lease of land that the lease should be forfeited on the tenant's bankruptcy<sup>1</sup> is valid; and, where there is such a proviso and the tenant becomes bankrupt, no interest in the demised premises is divisible among the creditors<sup>2</sup>. However, a proviso of this kind applies only to the bankruptcy of the person in possession of the term created by the lease; if a tenant assigns his term and after the assignment becomes bankrupt, his bankruptcy does not operate to determine the lease<sup>3</sup>.



1 Where a lease contains a condition as to forfeiture on the tenant's bankruptcy and on his assigning without licence, and, after the tenant's bankruptcy, the landlord accepts rent from the trustee and treats him as tenant, the condition is gone; it is not clear whether in such a case the landlord may insist on the condition as to forfeiture for assigning without licence: see *Dyke v Taylor* (1861) 30 LJ Ch 281.

2 *Roe d Hunter v Galliers* (1787) 2 Term Rep 133. If the landlord enters for forfeiture on a tenant's bankruptcy, any growing crops on the land belong to the landlord and not to the tenant's creditors: *Davis v Eytan* (1830) 7 Bing 154. A provision in a lease giving the tenant a right to compensation for certain crops 'at the expiration of the term' has no application when the landlord enters for a forfeiture on the tenant's bankruptcy: *Silcock v Farmer* (1882) 46 LT 404, CA; but see *Re Morrish, ex p Hart Dyke* (1882) 22 ChD 410, CA, applied in *Re ABC Coupler and Engineering Co Ltd (No 3)* [1970] 1 All ER 650, [1970] 1 WLR 702. As to the statutory rights to compensation for growing crops on the termination of the tenancy of an agricultural holding see AGRICULTURAL LAND vol 1 (2008) PARA 363 et seq.

If a landlord enters for a forfeiture on bankruptcy, and there is a special contract relating to fixtures which belong to the tenant, the trustee is entitled to a reasonable time to remove them: *Stansfield v Portsmouth Corp'n* (1858) 27 LJCP 124. Apart from special contract or statute, the right to remove the fixtures is gone when the term is at an end: *Pugh v Arton* (1869) LR 8 Eq 626. As to the statutory rights of a tenant of an agricultural holding to remove fixtures see AGRICULTURAL LAND vol 1 (2008) PARAS 305, 336; and as to fixtures generally see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 172 et seq.

Forfeiture has been held to take place on the presentation of a bankruptcy petition where the proviso in the lease provided for forfeiture on the filing of a petition in liquidation under former bankruptcy legislation: *Re Walker, ex p Gould* (1884) 13 QBD 454. If the landlord accepts rent from the trustee in bankruptcy, the right of forfeiture is gone: see note 1 supra. The tenancy of an allotment garden may be terminated under a provision for re-entry on the tenant becoming bankrupt or compounding with his creditors: see the Allotments Act 1922 s 1(1)(e); and AGRICULTURAL LAND vol 1 (2008) PARA 564.

Where the lease of a dwelling house contains a provision for forfeiture on bankruptcy, and the lessee is holding on as a tenant, the court may grant possession against him if he becomes bankrupt, on the ground that he has committed a breach of an obligation of his tenancy: *Re Drew* [1929] IR 504.

3 *Smith v Gronow* [1891] 2 QB 394. The proviso runs with the land: *Horsey Estate Ltd v Steiger* [1899] 2 QB 79.

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#### **413. Restrictions on, and relief against, forfeiture.**

If the term created by a lease is determinable on bankruptcy, then, except in certain specified cases<sup>1</sup>, the landlord may exercise his right of forfeiture only subject to statutory conditions<sup>2</sup>. If the lessee's interest is sold<sup>3</sup> within one year from the bankruptcy, the landlord, even after the end of the year, may enforce his right only if he serves the notice required by the statutory conditions, and subject to the provisions as to relief against forfeiture contained in them<sup>4</sup>.

If, however, there has been no sale during the year, the restrictions on forfeiture cease at the end of the year, the landlord may enforce his right of re-entry without serving the statutory notice, and relief against forfeiture of the lease may no longer be claimed<sup>5</sup>.

1 The Law of Property Act 1925 s 146 (as amended) does not apply to a condition for forfeiture on the bankruptcy of the lessee if contained in a lease of: (1) agricultural or pastoral land; (2) mines or minerals; (3) a house used or intended to be used as a public house or beer shop; (4) a house let as a dwelling house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures; (5) any property with respect to which the tenant's personal qualifications are of importance for the preservation of the property's value or character, or on the ground of neighbourhood to the lessor, or to any person holding under him: s 146(9).

2 See generally *ibid* s 146 (as amended); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 613 et seq. Where any premises are let as a dwelling on a lease which is subject to a right of re-entry or forfeiture, it is not lawful to enforce that right otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them: see the Protection from Eviction Act 1977 s 2; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 653.

3 To come within this provision, a sale must be completed by conveyance, or the contract entered into must be an absolute contract for sale: *Re Henry Castle & Sons Ltd, Mitchell v Henry Castle & Sons Ltd* (1906) 94 LT 396.

4 See the Law of Property Act 1925 s 146(10)(a); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 626. See also *Civil Service Co-operative Society v McGrigor's Trustee* [1923] 2 Ch 347 at 355; *Pearson v Gee and Braceborough Spa Ltd* [1934] AC 272 at 277, 278, HL.

5 See the Law of Property Act 1925 s 146(10)(b); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 626. See also *Pearson v Gee and Braceborough Spa Ltd* [1934] AC 272 at 278, HL. The landlord's right of re-entry during the year is merely fettered and not abrogated: *Civil Service Co-operative Society v McGrigor's Trustee* [1923] 2 Ch 347. A re-entry within the year is void against the lessee's trustee in bankruptcy if the statutory notice has not been served: *Re Riggs, ex p Lovell* [1901] 2 KB 16. Although, in a case where the lessee's interest has not been sold, an application for relief against forfeiture of the lease may be made only within one year from the bankruptcy, the court's jurisdiction to entertain an application made during the year does not cease merely because the application is not dealt with before the year expires: *Pearson v Gee and Braceborough Spa Ltd* supra. The right of any underlessee to claim relief under the Law of Property Act 1925 s 146(4) (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 627) is not affected by the expiry of the right to claim relief in respect of the lease which is forfeited: Law of Property (Amendment) Act 1929 s 1.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(ii) Property Available to the Trustee/414. When covenant against assignment binds trustee.

#### **414. When covenant against assignment binds trustee.**

Whether a proviso for forfeiture of a term, in the event of the lessee assigning his interest without the lessor's assent, binds the lessee's trustee in bankruptcy depends on the wording of the proviso. If the covenant against assignment without consent includes the lessee's

successors in title, then the trustee is bound by it<sup>1</sup>. If the covenant was made after 31 December 1925, it will include the successors in title to the lessee unless a contrary intention is expressed<sup>2</sup>. If, however, the covenant expressly relates only to executors, administrators or assigns, the trustee is not bound<sup>3</sup>.

1 *Re Wright, ex p Landau v Trustee* [1949] Ch 729, [1949] 2 All ER 605 (a trustee in bankruptcy is a successor in title but is not an assign), distinguishing *Doe d Goodbehere v Bevan* (1815) 3 M & S 353. See also *Re Farrow's Bank Ltd* [1921] 2 Ch 164, CA; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 481 et seq.

2 See the Law of Property Act 1925 s 79; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 256.

3 *Doe d Goodbehere v Bevan* (1815) 3 M & S 353; *Doe d Cheere v Smith* (1814) 5 Taunt 795; *Goring v Warner* (1724) 2 Eq Cas Abr 100; and see *Re Johnson, ex p Blackett* (1894) 70 LT 381.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **415. Mortgaged property.**

If any part of the property of the bankrupt has been mortgaged, the property passes to the trustee subject to the mortgagee's estate or interest<sup>1</sup>, and subject to the mortgagee's rights to take possession even after the bankruptcy and to exercise all the other rights of a mortgagee. Thus, he will be entitled as against the trustee to the fixtures on the mortgaged property<sup>2</sup> and to growing crops there<sup>3</sup>. If a business is carried on there and the goodwill is not separable from the premises and would pass on a sale of the premises, the goodwill is comprised in the security<sup>4</sup>.

A contract between a mortgagor and a mortgagee providing for a different distribution of the mortgagor's property in the event of his bankruptcy, or that the mortgagee should have an additional benefit on such an event, is void<sup>5</sup>.

Any person claiming to be the legal or equitable mortgagee of land<sup>6</sup> belonging to the bankrupt may apply to the court for an order directing that the land be sold<sup>7</sup>. If satisfied as to the applicant's title, the court may direct accounts to be taken and inquiries to be made to ascertain:

- 587 (1) the principal, interest and costs due under the mortgage; and
- 588 (2) where the mortgagee has been in possession of the land or any part of it, the rents and profits, dividends, interest, or other proceeds received by him or on his behalf;

and directions may be given by the court with respect to any mortgage, whether prior or subsequent, on the same property, other than that of the applicant<sup>8</sup>.

For the purpose of those accounts and inquiries, and of making title to the purchaser, any of the parties may be examined by the court, and must produce on oath before the court all such documents in their custody or under their control relating to the estate of the bankrupt as the court may direct; and the court may order any of the parties to clarify any matter which is in dispute in the proceedings or give additional information in relation to any such matter and the normal rules on further information<sup>9</sup> apply to any such order<sup>10</sup>.

In any proceedings between a mortgagor and mortgagee, or the trustee of either of them, the court may order accounts to be taken and inquiries to be made in like manner as in the Chancery Division of the High Court<sup>11</sup>.

The court may order that the land, or any specified part of it, be sold; and any party bound by the order and in possession of the land or part, or in receipt of the rents and profits from it, may be ordered to deliver up possession or receipt to the purchaser or to such other person as the court may direct<sup>12</sup>. The court may permit the person having conduct of the sale to sell the land in such manner as he thinks fit; alternatively, the court may direct that the land be sold as directed by the order<sup>13</sup>.

The court's order may contain directions:

- 589 (a) appointing the persons to have the conduct of the sale;
- 590 (b) fixing the manner of sale, whether by contract conditional on the court's approval, private treaty, public auction or otherwise;
- 591 (c) settling the particulars and conditions of sale;
- 592 (d) obtaining evidence of the value of the property, and fixing a reserve or minimum price;
- 593 (e) requiring particular persons to join in the sale and conveyance;
- 594 (f) requiring the payment of the purchase money into court, or to trustees or others;
- 595 (g) if the sale is to be by public auction, fixing the security, if any, to be given by the auctioneer, and his remuneration<sup>14</sup>.

If the sale is to be by public auction, the court may direct that the mortgagee may appear and bid on his own behalf<sup>15</sup>.

The proceeds of sale must be applied:

- 596 (i) first, in payment of the expenses of the trustee, of and occasioned by the application to the court, of the sale and attendance thereat, and of any costs arising from the taking of accounts and making of inquiries<sup>16</sup>; and
- 597 (ii) secondly, in payment of the amount found due to any mortgagee, for principal, interest and costs;

and the balance, if any, must be retained by or paid to the trustee<sup>17</sup>.

Where the proceeds of sale are insufficient to pay in full the amount found due to any mortgagee, he is entitled to prove as a creditor for any deficiency, and to receive dividends rateably with other creditors, but not so as to disturb any dividend already declared<sup>18</sup>.

1 *Re Caine's Mortgage Trusts* [1918] WN 370. As to the rights of a secured creditor, and as to the trustee's right to redeem, see para 560 et seq post. Notwithstanding the trustee's failure to exercise his right to redeem, the mortgagee's rights as against the mortgaged property in the possession of the bankrupt may become statute-barred: *Cotterell v Price* [1960] 3 All ER 315, [1960] 1 WLR 1097.

2 *Re Allnut, ex p Spicer* (1837) 2 Deac 335; *Re Nutter, ex p Cotton* (1842) 2 Mont D & De G 725; *Re Stead, ex p Price* (1842) 2 Mont D & De G 518; *Re West, ex p Bentley* (1842) 2 Mont D & De G 591; *Re Mackie, ex p Tagart* (1847) De G 531; *Re Inwood, ex p Cowell* (1848) 17 LJ Bcy 16; *Mather v Fraser* (1856) 25 LJ Ch 361; *Waterfall v Penistone* (1856) 26 LJB 100; *Boyd v Shorrock* (1867) LR 5 Eq 72; *Re Richards, ex p Astbury, ex p Lloyd's Banking Co* (1869) 4 Ch App 630; *Longbottom v Berry* (1869) 10 B & S 852; *Holland v Hodgson* (1872) LR 7 CP 328; *Re Kitchin, ex p Punnett* (1880) 16 ChD 226, CA; *Hobson v Gorrington* [1897] 1 Ch 182, CA; *Reynolds v Ashby & Son* [1904] AC 466, HL (distinguishing *Gough v Wood & Co* [1894] 1 QB 713, CA); *Monti v Barnes* [1901] 1 KB 205, CA; *Ellis v Glover and Hobson Ltd* [1908] 1 KB 388, CA.

3 The mortgagee may take possession of growing crops after the bankruptcy (*Bagnall v Villar* (1879) 12 ChD 812), but not when he claims under an unregistered bill of sale, and the growing crops have been severed and have become personal chattels and have not been taken by the grantee before the commencement of the bankruptcy; in such a case they will pass to the trustee (*Re Phillips, ex p National Mercantile Bank* (1880) 16 ChD 104, CA; and see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1670.

4 *Re Kitchin, ex p Punnett* (1880) 16 ChD 226, CA (public house); *Chissum v Dewes* (1828) 5 Russ 29 (upholsterer's business); *King v Midland Rly Co* (1868) 17 WR 113 (baker's business). Stock-in-trade and other personal chattels on mortgaged premises, if not specifically included in the mortgage, will pass to the mortgagor's trustee in bankruptcy: *Re McManus, ex p Jardine* (1875) 10 Ch App 322; *Lyon & Co v London City and Midland Bank* [1903] 2 KB 135.

5 *Re Jeavons, ex p Mackay, ex p Brown* (1873) 8 Ch App 643; *Re Thompson, ex p Williams* (1877) 7 ChD 138, CA; *Re Johns, Worrell v Johns* [1928] 1 Ch 737; cf *Re Stockton Iron Furnace Co* (1879) 10 ChD 335.

6 For these purposes, 'land' includes any interest in, or right over, land: Insolvency Rules 1986, SI 1986/1925, r 6.197(1).

7 Ibid r 6.197(1).

8 Ibid r 6.197(2).

9 le CPR Pt 18: see CIVIL PROCEDURE vol 11 (2009) PARA 611 et seq.

10 Insolvency Rules 1986, SI 1986/1925, r 6.197(3) (amended by SI 1999/1022).

11 Insolvency Rules 1986, SI 1986/1925, r 6.197(4).

12 Ibid r 6.198(1).

13 Ibid r 6.198(2).

14 Ibid r 6.198(3).

15 Ibid r 6.198(4).

16 le as directed by ibid r 6.197 (as amended): see supra.

17 Ibid r 6.199(1).

18 Ibid r 6.199(2).

## UPDATE

### 390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors

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ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(ii) Property Available to the Trustee/416. Agricultural holdings and charges.

#### **416. Agricultural holdings and charges.**

The statutory requirements concerning the length of a notice to quit an agricultural holding and a tenant's right to serve a counter-notice are modified in the case of bankruptcy proceedings against the tenant<sup>1</sup>.

Where a farmer who is adjudged bankrupt has created in favour of a bank an agricultural charge on any of the farming stock or other agricultural assets belonging to him, and the charge was created within three months of the date of the presentation of the bankruptcy petition and operated to secure any sum owing to the bank immediately prior to the giving of the charge, then, unless it is proved that the farmer immediately after the execution of the charge was solvent, the amount which but for this provision would have been secured by the charge is to be reduced by the amount of the sum so owing to the bank immediately prior to the giving of the charge, but without prejudice to the bank's right to enforce any other security for that sum or to claim payment thereof as an unsecured debt<sup>2</sup>.

1 See AGRICULTURAL LAND vol 1 (2008) PARAS 376, 382.

2 Agricultural Credits Act 1928 s 8(5). As to registration of agricultural charges see s 9 (amended by the Land Charges Act 1972 s 18(1), Sch 3 para 7); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1331.

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#### **417. Contracts.**

Rights arising out of contracts made by the bankrupt pass to the trustee, if not disclaimed<sup>1</sup> or discharged<sup>2</sup>, subject to the rights of the persons with whom the bankrupt has contracted, and to the rights of third persons which have been created in respect of them<sup>3</sup>. Where a person is adjudged bankrupt, any disposition of property made by that person in the period beginning with the day of the presentation of the petition for the bankruptcy order<sup>4</sup> and ending with the vesting of the bankrupt's estate in a trustee<sup>5</sup> is void except to the extent that it is or was made with the consent of the court, or is or was subsequently ratified by the court<sup>6</sup>. The above provisions do not, however, give a remedy against any person:

- 598 (1) in respect of any property or payment which he received before the commencement of the bankruptcy<sup>7</sup> in good faith, for value and without notice that the petition had been presented; or
- 599 (2) in respect of any interest in property which derives from an interest in respect of which there is, by virtue of this provision, no remedy<sup>8</sup>.

A disposition of property is void under the above provisions notwithstanding that the property is not or, as the case may be, would not be comprised in the bankrupt's estate; but nothing in the above provisions affects any disposition made by a person of property held by him on trust for any other person<sup>9</sup>.

Although bankruptcy does not determine a contract if the trustee elects to go on with it, it does in some cases qualify the rights to which the trustee succeeds, which are not always the same as the bankrupt's rights would have been had he remained solvent.

Thus, on a sale of goods to the bankrupt, if both the property in the goods and the possession have passed to the bankrupt, the trustee takes the goods; and, if they have not been paid for, the vendor has no other remedy than to prove in the bankruptcy for the price<sup>10</sup>. Where the sale is without any stipulation as to credit, the seller has in all cases the unpaid seller's lien or right to retain possession until the price is paid; the bankrupt's trustee is not entitled to possession of the goods until he pays for them, and the seller may insist on being paid in full as a condition of parting with possession<sup>11</sup>. Moreover, on a sale of goods on credit, where the possession has not passed to the bankrupt, bankruptcy qualifies the buyer's rights; for, if the buyer becomes bankrupt before he has obtained possession of the goods, the seller may refuse to deliver the goods until they have been paid for<sup>12</sup>. Even though there has been part delivery of the goods, the seller's lien may be exercised over the remainder, except where the part delivery constitutes a waiver<sup>13</sup>.

Where goods are to be delivered by instalments, to be paid for separately, the unpaid seller is not, after the bankruptcy, bound to deliver any more goods until the price is tendered to him; and, if a debt is due to the seller for goods already delivered, he may refuse to deliver any more goods until he is paid the debt already due, as well as the price of the goods which are still to be delivered<sup>14</sup>. Where the sale has been induced by the purchaser's fraud, the vendor is entitled, within a reasonable time after discovering the fraud, to repudiate the contract and retake possession of the goods<sup>15</sup>.

If a bill of exchange has been given for the price of the goods and the buyer becomes insolvent, the seller's lien revives<sup>16</sup>. The lien may be exercised even though the seller is in possession of the goods as the buyer's agent or bailee<sup>17</sup>.

1    Ie under the Insolvency Act 1986 s 315 (as amended): see para 472 et seq post.

2    Ie under *ibid* s 345: see para 677 post.

3    *Re Garrud, ex p Newitt* (1881) 16 ChD 522 at 531, CA; and see para 394 ante. Where an employer agreed with a retiring employee to make certain payments to his widow or daughter if he, the employee, died before a certain date, and the employee was subsequently adjudicated bankrupt and died before that date, his trustee in bankruptcy was held not entitled to intercept the payment: *Re Schebsman* [1944] Ch 83, [1943] 2 All ER 768, CA (approved in *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL). As to contracts providing benefits for third parties generally see CONTRACT.

4    As to presentation of a petition for a bankruptcy order see para 124 et seq ante.

5    Ie under the Insolvency Act 1986 Pt IX Ch IV (ss 305-335) (as amended): see para 390 et seq ante.

6    See *ibid* s 284(1), (3); and para 217 ante. Section 284(1) applies to a payment, whether in cash or otherwise, as it applies to a disposition of property and, accordingly, where any payment is void by virtue of s 284(1), the persons must hold the sum paid for the bankrupt as part of his estate: see s 284(2); and para 217 ante.

7 As to commencement of bankruptcy see para 213 ante.

8 See the Insolvency Act 1986 s 284(4); and para 217 ante.

9 See *ibid* s 284(6); and para 217 ante.

10 See *Re Shackleton, ex p Whittaker* (1875) 10 Ch App 446; but see *Re Dyton, Appleton v Hole* (1952) 102 L Jo 669 (agreement for assignment of lease of hotel and agreement for sale of furniture for a price payable by instalments; bankruptcy of purchaser before all instalments paid; vendor held to have equitable lien on furniture for unpaid instalments). As to vendor's lien generally see LIEN vol 68 (2008) PARA 859 et seq. Sub-purchasers of unappropriated goods will in general be unable to claim a beneficial interest in the chattels represented by their portions on the insolvency of the holder of the goods: see *Re Wait* [1927] 1 Ch 606, CA; *Re London Wine Co (Shippers) Ltd* [1986] PCC 121; *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, [1994] 2 All ER 806, PC. However, unappropriated goods may be subject to a trust in favour of the purchaser: *Hunter v Moss* [1994] 3 All ER 215, [1994] 1 WLR 452, CA; *Re Harvard Securities (in liquidation), Holland v Newbury* [1997] 2 BCLC 369; and see further para 431 post. As to when the property passes on a contract to sell goods see the Sale of Goods Act 1979 ss 16-19; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 109 et seq. As to when the property passes on a contract to build or to manufacture see *Reid v Macbeth and Gray* [1904] AC 223, HL; and see *Woods v Russell* (1822) 1 Dow & Ry KB 587; *Clarke v Spence* (1836) 4 Ad & El 448; *Laidler v Burlinson* (1837) 2 M & W 602; *Tripp v Armitage* (1839) 4 M & W 687; *Baker v Gray* (1856) 25 LJCP 161; *Wood v Bell* (1856) 25 LJQB 321; *Re Attwater, ex p Watts* (1862) 1 New Rep 170; *Seath v Moore* (1886) 11 App Cas 350, HL; *Bellamy v Davey* [1891] 3 Ch 540; BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 129-131.

11 See the Sale of Goods Act 1979 ss 39, 41(1)(a); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 236 et seq.

12 See *ibid* ss 39, 41(1)(c); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 236 et seq.

13 See *ibid* s 42; *Miles v Gorton* (1834) 2 Cr & M 504; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 243.

14 *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289; and see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 176 et seq.

15 *Re Eastgate, ex p Ward* [1905] 1 KB 465 (rescission after notice of act of bankruptcy); *Tilley v Bowman Ltd* [1910] 1 KB 745 (rescission after date of receiving order); *Gamage Ltd v Charlesworth* 1910 SC 257. Cf *Kin Tye Loong v Seth* (1920) 89 LJPC 113 (where it was held that the vendors had elected to affirm the sale); and see *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 at 558, [1964] 1 All ER 290 at 298, CA (where *Re Eastgate, ex p Ward* supra was referred to); *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560, [1964] 3 All ER 532, CA.

16 *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491; and see *New v Swain* (1828) Dan & LI 193; *Dixon v Yates* (1833) 5 B & Ad 313; *Re Raatz, ex p Raatz* [1897] 2 QB 80, DC.

17 See the Sale of Goods Act 1979 s 41(2); *Grice v Richardson* (1877) 3 App Cas 319, PC; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 242. As to the seller's right of stoppage in transit see the Sale of Goods Act 1979 ss 39, 44; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 256 et seq.

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## **417 Contracts**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



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#### **418. Trustee's right to enforce contracts.**

Bankruptcy does not determine a contract<sup>1</sup>, and included in the property which passes to the trustee on adjudication is the right of enforcing certain unexecuted or uncompleted contracts into which the bankrupt has entered, and from which benefits may accrue to the estate<sup>2</sup>.

Thus, all rights under contracts which, if the bankrupt had died, would pass as part of his personal estate to his personal representatives pass to the trustee on his bankruptcy; but rights under contracts where the bankrupt's personal skill or conduct forms a material part of the consideration<sup>3</sup>, which the trustee cannot perform on his behalf, such as a contract to render personal services, to paint a picture or to write a book, do not pass<sup>4</sup>.

As regards unprofitable contracts, which the trustee could perform, he may elect either to adopt or to disclaim them<sup>5</sup>. Should he disclaim them, the persons who have contracted with the bankrupt may prove in the bankruptcy for damages for the value of the injury they have thereby sustained<sup>6</sup>; if the trustee insists on the contract being performed<sup>7</sup>, he must perform the bankrupt's part of the contract, as and when the bankrupt should have done so himself<sup>8</sup>.

1 *Brooke v Hewitt* (1796) 3 Ves 253 at 255; *Re Sneezum, ex p Davis* (1876) 3 ChD 463 at 473, CA; *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289 at 293, 294; *Jennings' Trustee v King* [1952] Ch 899 at 908, [1952] 2 All ER 608 at 612. Bankruptcy of principal or agent usually determines the agent's authority to act as agent: *Re Douglas, ex p Snowball* (1872) 7 Ch App 534; *Markwick v Hardingham* (1880) 15 ChD 339, CA. As to powers of attorney see AGENCY vol 1 (2008) PARA 31 et seq; as to the general effect of the bankruptcy of principal or agent see AGENCY vol 1 (2008) PARAS 190-191 respectively; and as to the effect of bankruptcy in the case of partnership see para 423 post.

2 The simplest instance of such contracts would be a contract under which the bankrupt is entitled to a sum of money payable either before or after bankruptcy; the right to the debt passes to the trustee: *Morgan v Taylor* (1859) 28 LJCP 178; *Re Pooley, ex p Rabbidge* (1878) 8 ChD 367, CA; *McEntire v Potter & Co* (1889) 22 QBD 438. As to the position where the contract is unexecuted at the date of bankruptcy see *Bailey v Thurston & Co Ltd* [1903] 1 KB 137.

3 *Gibson v Carruthers* (1841) 8 M & W 321 at 333 per Parke B; and see *Knight v Burgess* (1864) 33 LJ Ch 727 (building contract); *Flood v Finlay* (1811) 2 Ball & B 9; *Bailey v Thurston & Co Ltd* [1903] 1 KB 137, CA; *Lucas v Moncrieff* (1905) 21 TLR 683 (contract to publish book); *Re Worthington, ex p Pathé Frères* [1914] 2 KB 299, CA (contract to procure subscriptions for shares).

4 An order with respect to salary or income under a contract for personal services may be made, as with any other income, under the Insolvency Act 1986 s 310 (as amended): see para 449 et seq post.

5 See *ibid* s 315 (as amended); and para 472 et seq post.

6 *Ibid* s 315(5). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 315 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

7 As regards a contract to grant a lease to a bankrupt, the trustee may obtain an order for its specific performance on agreeing to be personally bound by the covenants into which the bankrupt could have been obliged to enter (*Powell v Lloyd* (1827) 1 Y & J 427; on appeal 2 Y & J 372, distinguishing the earlier cases to the contrary effect; and see *Buckland v Papillon* (1866) 2 Ch App 67); and as to the form of such a lease to the trustee see *Page v Broom* (1842) 6 Jur 308. A person to whom the benefit of an agreement for a lease has been assigned by a bankrupt, before he becomes bankrupt, is entitled to specific performance of the agreement, if

solvent and willing to enter into the usual covenants, and if the consideration for it was not personal to the assignor: *Crosbie v Tooke* (1833) 1 My & K 431. However, the trustee is not entitled to specific performance of an agreement for a lease entered into for the bankrupt's personal accommodation: *Flood v Finlay* (1811) 2 Ball & B 9. The trustee in bankruptcy of the purchaser under a contract for the sale of land may recover damages for breach of contract if the vendor improperly repudiates the contract: *Jennings' Trustee v King* [1952] Ch 899, [1952] 2 All ER 608.

8 *Gibson v Carruthers* (1841) 8 M & W 321 at 333.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(ii) Property Available to the Trustee/419. Uncompleted contracts relating to land.

#### **419. Uncompleted contracts relating to land.**

If, before his bankruptcy, the bankrupt has contracted to sell or mortgage property, the trustee takes the property subject to the obligation to fulfil the contract<sup>1</sup>. The legal estate in the property vests in the trustee subject to the equitable title of the purchaser to have the estate conveyed to him on payment of the purchase price<sup>2</sup>. If the purchaser, unaware of the bankruptcy, pays the balance of the purchase money to the bankrupt, he pays the wrong person and cannot compel the trustee to execute a conveyance without paying the purchase money again to him<sup>3</sup>. Specific performance of a contract by the bankrupt to purchase property will not normally be granted against the trustee<sup>4</sup>.

Where a landowner who is subsequently adjudged bankrupt enters into a contract to sell his land, special protection is afforded to the purchaser under the conditions prescribed by the conveyancing statutes<sup>5</sup>.

In the case of land, other than registered land, which the bankrupt has contracted to sell, the effectiveness, as against the trustee in bankruptcy, of a disposition in favour of a purchaser depends in the first instance on whether the bankruptcy petition has been registered against the vendor as a pending action<sup>6</sup>, or a bankruptcy order has been registered as a writ or order affecting the land<sup>7</sup>, such registration constituting actual notice to all persons and for all purposes connected with the land affected<sup>8</sup>, and thus binding the purchaser.

If the land is registered land, the question whether the purchaser has express notice of a bankruptcy petition registered as a pending action becomes material, for, if he has, he will not be protected<sup>9</sup>.

Whereas a pending land action does not bind a purchaser<sup>10</sup> without express notice of it unless it is registered as a pending action, as respects a petition in bankruptcy, the protection only applies in favour of a purchaser of a legal estate in good faith, for money or money's worth<sup>11</sup>. As respects bankruptcy orders, the protection afforded to a purchaser of the land against unregistered writs and orders<sup>12</sup> is restricted to a purchaser of a legal estate in good faith for money or money's worth<sup>13</sup>. The title of a trustee in bankruptcy is void as against a purchaser of

a legal estate in good faith for money or money's worth, claiming under a conveyance made after the date of registration of the petition as a pending action, unless, at the date of the conveyance, either the registration of the petition as a pending action is in force<sup>14</sup>, or the receiving order is registered<sup>15</sup> in the register of writs and orders<sup>15</sup>.

In the case of land the title to which is registered, a writ, order or pending action may be protected only by lodging a creditor's notice, a bankruptcy inhibition or a caution against dealings with the land<sup>16</sup>. Subject to the provisions of the Land Registration Act 1925 relating to fraud and to the trustee in bankruptcy's title, a purchaser acquiring title under a registered disposition is not, in the absence of such protection, bound by any writ, order or pending action, whether or not he has express, implied or constructive notice of it<sup>17</sup>. Where under a disposition to a purchaser in good faith for money or money's worth the purchaser is registered as proprietor of an estate or charge, then, notwithstanding that the person making the disposition is adjudged bankrupt, the trustee in bankruptcy's title is, as from the date of the disposition, void as against that purchaser, unless at the date of the disposition either a creditor's notice<sup>18</sup> or a bankruptcy inhibition<sup>19</sup> has been registered; but a purchaser who at the date of the execution of the registered disposition had notice of the bankruptcy petition or the adjudication will not be deemed to take in good faith<sup>20</sup>.

1 *Pearce v Bastable's Trustee in Bankruptcy* [1901] 2 Ch 122; *Re Bastable, ex p Trustee* [1901] 2 KB 518, CA; *Re Taylor, ex p Norvell* [1910] 1 KB 562, CA; *Re Scheibler, ex p Holthausen* (1874) 9 Ch App 722.

2 *Re Pooley, ex p Rabbidge* (1878) 8 ChD 367 at 370, CA; *Re Scheibler, ex p Holthausen* (1874) 9 Ch App 722 at 726.

3 *Re Pooley, ex p Rabbidge* (1878) 8 ChD 367, CA; and see *Re Taylor, ex p Norvell* [1910] 1 KB 562, CA.

4 *Holloway v York* (1877) 25 WR 627. As to specific performance of a contract to grant a lease to a bankrupt, and as to a trustee's right to enforce contracts, see para 418 ante.

5 The Land Charges Act 1972 provides for the registration of the several instruments and matters mentioned in it, some of which do not, or should not, appear in the abstract or epitome of title. The Land Charges Act 1972 must be considered in conjunction with the Law of Property Act 1925 s 198 (as amended) and s 199. The registration of any instrument or matter in any register kept under the Land Charges Act 1972 or any local land charges register is deemed to constitute actual notice of the instrument or matter to all persons and for all purposes connected with the land affected: see the Law of Property Act 1925 s 198(1) (amended by the Local Land Charges Act 1975 s 17(2), Sch 1); and LAND CHARGES vol 26 (2004 Reissue) para 693. A purchaser is not to be prejudicially affected by notice of any instrument or matter capable of such registration which is void or unenforceable against him under the 1972 Act: see the Law of Property Act 1925 s 199(1)(i); and LAND CHARGES vol 26 (2004 Reissue) para 616. There is no positive obligation to register; the sanction lies in the effects and consequences of non-registration: see the Land Charges Act 1972 ss 4-7 (as amended); *infra*; and LAND CHARGES.

6 See *ibid* s 5 (as amended), s 8 (cited in note 14 *infra*); paras 167, 193 ante; and LAND CHARGES vol 26 (2004 Reissue) para 648 et seq. As to the vacation of registration see ss 1(6), (6A) (added by the County Courts Act 1984 s 148(1), Sch 2 Pt IV para 16; substituted by the High Court and County Courts Jurisdiction Order 1991, SI 1991/784, art 2(8), Schedule), the Land Charges Act 1972 s 5 (amended by the County Courts Act 1984 Sch 2 Pt IV para 17; the Insolvency Act 1985 s 235(1), (3), Sch 8 para 21(2), Sch 10 Pt III), the Land Charges Act 1972 s 8; and LAND CHARGES.

7 See *ibid* s 6 (amended by the Insolvency Act 1985 Sch 8 para 21(3), Sch 10 Pt III); the Land Charges Act 1972 s 8 (cited in note 14 *infra*); and LAND CHARGES vol 26 (2004 Reissue) para 654 et seq.

8 See the Law of Property Act 1925 s 198(1) (as amended) (cited in note 5 *supra*).

9 See the Land Charges Act 1972 s 5(7); and LAND CHARGES vol 26 (2004 Reissue) para 650. This is so notwithstanding the Law of Property Act 1925 s 199, whereby a purchaser is not normally prejudicially affected by express notice of an unregistered matter capable of registration under the Land Charges Act 1972.

10 Unless the context otherwise requires, 'purchaser' in the Land Charges Act 1972 means any person, including a mortgagee or lessee, who for valuable consideration takes any interest in land or in a charge on land: s 17(1).

11 See *ibid* s 5(8) (amended by the Insolvency Act 1985 Sch 8 para 21(2)); and LAND CHARGES vol 26 (2004 Reissue) para 650.

12 See the Land Charges Act 1972 s 6(4) (amended by the Supreme Court Act 1981 s 152(1), Sch 5; the County Courts Act 1984 s 148(1), Sch 2 Pt IV para 18); and LAND CHARGES vol 26 (Reissue) para 558.

13 See the Land Charges Act 1972 s 6(5) (substituted by the Insolvency Act 1985 Sch 8 para 21(3)); and LAND CHARGES vol 26 (2004 Reissue) para 658.

14 A registration ceases to have effect at the end of five years from the date on which it was made, but may be renewed from time to time and, if so renewed, has effect for five years from the date of renewal: see the Land Charges Act 1972 s 8; and LAND CHARGES vol 26 (Reissue) para 660. See also note 15 *infra*.

15 See *ibid* s 6(6) (amended by the Insolvency Act 1985 Sch 10 Pt III); and LAND CHARGES vol 26 (2004 Reissue) para 650. The Land Charges Act 1972 s 6(6) (as so amended) refers to a 'receiving order'. It is apprehended that such reference was intended to be to a 'bankruptcy order' in line with the other amendments made to the 1972 Act by the Insolvency Act 1985 s 235(1), Sch 8 para 21(3) and that such amendment was omitted through an oversight on the part of the legislature.

Any question arising whether the purchaser had knowledge, at the time of entering into the contract, of the registered bankruptcy petition, must be determined by reference to his actual knowledge: see the Law of Property Act 1969 s 24(1), (3); and LAND CHARGES vol 26 (2004 Reissue) para 616.

16 See the Land Registration Act 1925 s 59(1); and LAND REGISTRATION.

17 See *ibid* s 59(6) (amended by the Finance Act 1975 s 52(1), Sch 12 paras 2, 5(1)); and LAND REGISTRATION.

18 See the Land Registration Act 1925 ss 49(1)(f), 61(1); and LAND REGISTRATION.

19 See *ibid* s 61(3), (4) (amended by the Insolvency Act 1985 Sch 8 para 5(3)); and LAND REGISTRATION.

20 See the Land Registration Act 1925 s 61(6) (amended by the Insolvency Act 1985 Sch 8 para 5(3)); and LAND REGISTRATION.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **419 Uncompleted contracts relating to land**

NOTE 12--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

TEXT AND NOTES 16-20--Land Registration Act 1925 replaced by Land Registration Act 2002: see LAND REGISTRATION.

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### **420. Rights under insurance contract.**

Where the bankrupt is insured against liabilities to third parties and he incurs any such liability, either before or after the bankruptcy, his rights against the insurer under the contract of insurance in respect of the liability vest in the third party to whom the liability was incurred, and do not pass to the trustee in bankruptcy<sup>1</sup>.

Where the Secretary of State for Trade and Industry has entered into an agreement for the reinsurance of a ship, aircraft or cargo against war risks, and the original insurer or any intermediate insurer becomes bankrupt, any sum payable by the Secretary of State or any intermediate insurer subsequent to the bankrupt insurer must be paid direct to the assured, and the assured's right to receive payment from the bankrupt insurer is, to the extent to which the risk has been so reinsured, extinguished<sup>2</sup>.

<sup>1</sup> See the Third Parties (Rights against Insurers) Act 1930 s 1 (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 7(2); the Insolvency Act 1986 s 439(2), Sch 14); and INSURANCE vol 25 (2003 Reissue) para 679 et seq. The Third Parties (Rights against Insurers) Act 1930 s 1 (as so amended) applies only to liability for damage to a third party caused by the fault of the insured and not to legal liability insurance: *Tarbut v Avon Insurance* [2001] BPIR 1142. In the case of compulsory motor vehicle insurance, the transfer of rights against the insurer by virtue of the 1930 Act does not affect the bankrupt's liability to the third party: see the Road Traffic Act 1988 s 153(1), (2); and ROAD TRAFFIC vol 40(2) (2007 Reissue) para 953.

The transfer of liability can only occur when that liability is fully established eg by judgment: *Sea Voyager Maritime Inc v Bielecki (t/a Hughes Hooker & Co)* [1999] 1 All ER 628, [1999] 1 BCLC 133. The rights of the injured party against the insurer under the 1930 Act are subjected to and limited by the terms of the bankrupt's policy, and he may accordingly be met with the defence that he has not previously sued the bankrupt to judgment (*Post Office v Norwich Union Fire Insurance Society* [1967] 2 QB 363, [1967] 1 All ER 577, CA); or that notice of the proceedings taken against the bankrupt had not been given to the insurer with sufficient promptness (*Farrell v Federated Employers Insurance Association Ltd* [1970] 3 All ER 632, [1970] 1 WLR 1400, CA); but he cannot be met by the insurer with a plea of set-off of premiums unpaid by the bankrupt (*Murray v Legal and General Assurance Society Ltd* [1970] 2 QB 495, [1969] 3 All ER 794). See further INSURANCE vol 25 (2003 Reissue) para 681.

<sup>2</sup> See the Marine and Aviation Insurance (War Risks) Act 1952 s 4; and INSURANCE vol 25 (2003 Reissue) para 813.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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### **420 Rights under insurance contract**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--Third Parties (Rights against Insurers) Act 1930 s 1 further amended: Enterprise Act 2002 (Insolvency) Order 2003, SI 2003/2096. See also *Law Society v Official Receiver* [2007] EWHC 2841 (Ch), [2007] BPIR 1595.

ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(ii) Property Available to the Trustee/421. Builder's bankruptcy.

#### **421. Builder's bankruptcy.**

A stipulation in a building contract that on the bankruptcy of the builder the materials brought by him on the ground should be forfeited to the building owner is void, as being an attempt to control the use, after bankruptcy, of property vested in the bankrupt at the date of the bankruptcy; accordingly, the materials would, in the event of the builder's bankruptcy, pass to his trustee<sup>1</sup>. However, a stipulation is valid which provides that, on default of the builder in fulfilling his part of the agreement, the building owner might expel him, and forfeit the materials brought by the builder on the land. This right of forfeiture is not affected by the bankruptcy of the builder, and may be exercised after his bankruptcy<sup>2</sup>.

1 *Re Harrison, ex p Jay* (1880) 14 ChD 19, CA; *Re Walker, ex p Barter, ex p Black* (1884) 26 ChD 510, CA.

2 *Brown v Bateman* (1867) LR 2 CP 272; *Re Waugh, ex p Dickin* (1876) 4 ChD 524; *Re Garrud, ex p Newitt* (1881) 16 ChD 522, CA; *Re Keen and Keen, ex p Collins* [1902] 1 KB 555. If a building agreement gives a power of forfeiture in the event of bankruptcy, and also in the event of the failure of the builder to complete, and the building owner seizes on bankruptcy, he cannot afterwards avail himself of the right to seize for the failure to complete: *Re Walker, ex p Barter, ex p Black* (1884) 26 ChD 510, CA. A clause in a building agreement, that materials brought on the ground are to be the property of the building owner, vests the materials in him, subject to a condition of defeasance, if the builder completes the work; such a clause is a security to the building owner for the performance of the work: *Hart v Porthgwin Harbour Co Ltd* [1903] 1 Ch 690. See further BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

### **UPDATE**

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **422. Shareholder's bankruptcy.**

Where any part of the bankrupt's estate consists of stock or shares in a company, shares in a ship or any other property transferable in the books of a company, office or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt<sup>1</sup>. The trustee of a bankrupt shareholder may be refused the right to have a transfer of the bankrupt's shares registered which may preclude him from exercising the rights attached to the shareholding<sup>2</sup>.

A proviso in a company's articles of association that a shareholder, in the event of his bankruptcy, should sell his shares to particular persons at a particular price is valid, if the price is fixed for all persons alike, and is not less than the fair price which might be obtained; but a

provision that, in the event of bankruptcy, the shares should be sold at a lower price would be repugnant to the bankruptcy laws and, therefore, void<sup>3</sup>.

1 See the Insolvency Act 1986 s 311(3); and para 397 ante.

2 *Re HL Bolton Engineering Co Ltd* [1956] Ch 577, [1956] 1 All ER 799 (where the trustee, who had not been registered as the holder of the bankrupt's shares, was held to have no locus standi to present a winding-up petition); cf *Re K/9 Meat Supplies (Guildford) Ltd* [1966] 3 All ER 320, [1966] 1 WLR 1112 (where the bankrupt unsuccessfully petitioned for winding up at the instance of the trustee), considered by Lord Wilberforce and Lord Cross of Chelsea in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, [1972] 2 All ER 492, HL.

The bankrupt may be required to exercise his vote in accordance with the trustee's or the official receiver's directions: *Morgan v Gray* [1953] Ch 83, [1953] 1 All ER 213; *Wise v Landseil* [1921] 1 Ch 420. The bankrupt shareholder retains, even after adjudication, the right to bring proceedings in his own name as a minority shareholder: see *Birch v Sullivan* [1958] 1 All ER 56, [1958] 1 WLR 1247.

3 *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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### **423. Share in partnership.**

If the bankrupt has carried on business in partnership with other persons, then, subject to any agreement between the partners, the partnership is dissolved by bankruptcy<sup>1</sup>; but the trustee is entitled to the value of the bankrupt partner's share and to an account<sup>2</sup>. If, after the bankruptcy, the other partner continues to carry on the business with the capital as constituted at the time of the bankruptcy, the bankrupt partner's trustee is entitled to participate in the subsequent profits<sup>3</sup>.

A proviso in a partnership agreement that, in the event of the bankruptcy of one of the partners, his share shall go over to his co-partners, is void as being in fraud of the bankruptcy laws<sup>4</sup>; so is a proviso that the bankrupt partner should, in the event of his bankruptcy, receive for his share a smaller sum than its real value<sup>5</sup>. Such arrangements between partners are valid only as between themselves, and do not bind creditors; and the trustee in bankruptcy of the bankrupt partner is entitled, in spite of such arrangements, to an account of the estate and profits of the partnership<sup>6</sup>.

1 See the Partnership Act 1890 s 33(1); and PARTNERSHIP vol 79 (2008) PARA 177. A limited partnership is not dissolved by the bankruptcy of a limited partner: see the Limited Partnerships Act 1907 s 6(2); and PARTNERSHIP vol 79 (2008) PARA 227.

2 See *Wilson v Greenwood* (1818) 1 Swan 471; *Whitmore v Mason* (1861) 2 John & H 204; *Re Williams, ex p Warden* (1872) 21 WR 51.

3 *Crawshay v Collins* (1808) 15 Ves 218.

4 *Whitmore v Mason* (1861) 2 John & H 204.

5 *Wilson v Greenwood* (1818) 1 Swan 471; *Re Williams, ex p Warden* (1872) 21 WR 51. A provision in a partnership agreement that, on the bankruptcy of one partner, his share should be taken by the solvent partners at a sum to be fixed by valuation and payable by instalments over a period may be void as repugnant to the bankruptcy laws: see *Wilson v Greenwood* supra.

6 *Re Williams, ex p Warden* (1872) 21 WR 51 at 52.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **424. Goodwill of bankrupt's business.**

If the bankrupt has carried on a business, the goodwill of the business passes on adjudication to his trustee, except:

- 600 (1) where the business premises have been mortgaged and the goodwill is attached to the premises, in which case the goodwill is comprised in the security<sup>1</sup>; and
- 601 (2) where the goodwill is personal to the bankrupt, as in the case of a professional person, in which case, it seems, it would not pass<sup>2</sup>.

Compensation which is given by statute to a bankrupt for the destruction of his business is analogous to goodwill and passes to the trustee<sup>3</sup>.

On the sale by the trustee of the goodwill of the bankrupt's business, the bankrupt may, it seems, be compelled to join in the assignment of his business and goodwill for the benefit of his creditors<sup>4</sup>; but he cannot be compelled to enter into any covenant restricting him from carrying on the same business<sup>5</sup>. Whether the bankrupt has or has not joined in the assignment of the goodwill to the purchaser, he cannot be restrained from setting up a fresh business or from soliciting his former customers<sup>6</sup>, except when he has agreed with the purchaser not to carry on a similar business<sup>7</sup>; although, even if he cannot be restrained, he cannot use the trade mark of the old business<sup>8</sup>, or in any way represent himself as carrying on the business which has been sold<sup>9</sup>.

1 See para 415 text and note 4 ante.

2 See *Farr v Pearce* (1818) 3 Madd 74. The right to publish a newspaper which has been published by the bankrupt passes to his trustee: *Longman v Tripp* (1805) 2 Bos & PNR 67; *Re Baldwin, ex p Foss, ex p Baldwin*



(1858) 2 De G & J 230. As to the rights of a trustee to the goodwill of a bankrupt's business see *Cruttwell v Lye* (1810) 17 Ves 335; *Re Thomas, ex p Thomas* (1841) 2 Mont D & De G 294 (revsd on another point 3 Mont D & De G 40); *Hudson v Osborne* (1869) 39 LJ Ch 79; *Walker v Mottram* (1881) 19 ChD 355, CA; *Buxton and High Peak Publishing and General Printing Co v Mitchell* (1885) Cab & El 527. As to the trustee's power to sell goodwill see the Insolvency Act 1986 s 314(1)(b), Sch 5 para 9; and para 461 head (1) post. Secret unwritten formulas used by the debtor in the manufacture of goods must be disclosed to the trustee as part of the goodwill of the business: *Re Keene* [1922] 2 Ch 475, CA; cf *Cotton v Gillard* (1874) 44 LJ Ch 90.

3 See *Chandler v Gardiner* (undated), cited in *Cruttwell v Lye* (1810) 17 Ves 335 at 338, 343 (where compensation to the proprietors of quays for the loss of their exclusive trade by the establishment of the West India Docks was held on bankruptcy to pass to their creditors).

4 *Walker v Mottram* (1881) 19 ChD 355 at 363, CA (decided under what became the Bankruptcy Act 1914 s 22(2), (3) (repealed) which prescribed the bankrupt's duties in more specific terms than does the Insolvency Act 1986 s 333(1) (see para 345 ante)).

5 *Walker v Mottram* (1881) 19 ChD 355 at 363, CA. See *Cruttwell v Lye* (1810) 17 Ves 335. As to covenants in restraint of trade generally see COMPETITION vol 18 (2009) PARA 377 et seq.

6 *Walker v Mottram* (1881) 19 ChD 355, CA; and see *Trego v Hunt* [1896] AC 7 at 13, 14, 23, HL; *Jennings v Jennings* [1898] 1 Ch 378 at 383. This principle also applies where a debtor has executed a deed of assignment for the benefit of his creditors: see *Green & Sons (Northampton) Ltd v Morris* [1914] 1 Ch 562; *Farey v Cooper* [1927] 2 KB 384.

7 See *Clarkson v Edge* (1863) 33 Beav 227; *Buxton and High Peak Publishing and General Printing Co v Mitchell* (1885) Cab & El 527; and COMPETITION vol 18 (2009) PARA 1 et seq.

8 *Hudson v Osborne* (1869) 39 LJ Ch 79; *Hammond & Co v Malcolm Brunner & Co and Collins* (1892) 9 RPC 301; but see *Cotton v Gillard* (1874) 44 LJ Ch 90.

9 *Hudson v Osborne* (1869) 39 LJ Ch 79.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **425. Patents, trade marks and royalties.**

Patents, trade marks and royalties which belong to a bankrupt pass to his trustee<sup>1</sup>. If a patentee becomes bankrupt and his patent is sold by the trustee, the patentee is not afterwards estopped from alleging that the patent is invalid or otherwise impugning it<sup>2</sup>.

A trustee in bankruptcy may register title to the patent<sup>3</sup>. The trustee may assign a registered trade mark with or without an assignment of the goodwill of the business, provided that the mark does not become deceptive in consequence<sup>4</sup>.

1 *Hesse v Stevenson* (1803) 3 Bos & P 565 (patents); *Re Graydon, ex p Official Receiver* [1896] 1 QB 417 (royalties). See also *Performing Right Society Ltd v Rowland, Rowland v Turp* [1997] 3 All ER 336 (distributions

made by virtue of performing rights in works completed prior to a songwriter's bankruptcy are a transmissible property right and not a mere expectancy and as such vest in his trustee in bankruptcy). As to the vesting of copyright in the trustee in bankruptcy see the Copyright, Designs and Patents Act 1988 s 90(1); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) para 158.

2 *Smith v Cropper* (1885) 10 App Cas 249, HL.

3 As to registration of title to a patent see the Patents Act 1977 s 32 (as substituted and amended) and s 33; and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 585 et seq.

4 See the Trade Marks Act 1994 s 24(1); *RJ Reuter Co Ltd v Mulhens* [1954] Ch 50, [1953] 2 All ER 1160, CA; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) para 129. As to applications for the correction of the trade marks register see the Trade Marks Act 1994 s 64; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) para 121.

Where a person who is adjudged bankrupt on a petition presented on or after 29 December 1986 (see para 2 ante) is liable, by virtue of a transaction entered into before that day, to pay royalties or a share of the profits to any person in respect of any copyright or interest in copyright comprised in the bankrupt's estate, the Bankruptcy Act 1914 s 60 (repealed) (limitation on trustee's powers in relation to copyright) applies in relation to the trustee of that estate as it applies in relation to a trustee in bankruptcy under the Bankruptcy Act 1914 (repealed); Insolvency Act 1986 s 437, Sch 11 para 15.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **426. Right of action.**

A right of action which is vested in the bankrupt at the date of adjudication passes to the trustee, unless it is personal to the bankrupt<sup>1</sup>. Where a right of action is acquired by the bankrupt since the commencement of the bankruptcy and is not personal to him, it forms part of his after-acquired property<sup>2</sup> of which he must give notice to the trustee<sup>3</sup> and which the trustee may claim for the estate<sup>4</sup>.

1 As to whether a right of action passes to the trustee see para 434 et seq post. A trustee is entitled to reassign the right of action to the bankrupt for a share of the net proceeds of the proceedings: see *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686, CA; and para 460 post.

2 As to after-acquired property see para 445 et seq post.

3 Ie under the Insolvency Act 1986 s 333(2): see para 447 post.

4 Ie under ibid s 307: see para 445 et seq post.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **427. Rights of spouses.**

Property which has been the subject of a gift to the bankrupt by the bankrupt's husband or wife passes to the trustee in bankruptcy<sup>1</sup>. Property which has been the subject of a gift by the bankrupt to the bankrupt's husband or wife will not pass to the trustee<sup>2</sup>, unless the gift can be avoided as a transaction at an undervalue<sup>3</sup>. The rule that an effective gift inter vivos of personal chattels may be made only by deed or by delivery applies between husband and wife, as well as between strangers<sup>4</sup>.

Neither a husband's nor a wife's right to administer the estate of a deceased spouse passes to the trustee of either of them who becomes bankrupt; but a grant of administration may in a proper case be made to the trustee in bankruptcy<sup>5</sup>.

1 *Re Grainger, ex p Grainger* (1871) 24 LT 334.

2 *Re Whitehead, ex p Whitehead* (1885) 14 QBD 419, CA. In certain cases articles of jewellery have been treated as constituting paraphernalia, ie property belonging to a husband which his wife was permitted to wear for the decoration of her person and which were subject to the claims of the husband's creditors: see eg *Ridout v Earl of Plymouth* (1740) 2 Atk 104; *Graham v Londonderry* (1746) 3 Atk 393. Doubts exist how far the doctrine of paraphernalia is applicable at the present day (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 246); but as to the necessity for an unequivocal act for the transfer of chattels from a husband to his wife see note 4 infra. In the absence of agreement to the contrary, a wife's savings from housekeeping money belong to her and her husband in equal shares: see the Married Women's Property Act 1964 s 1; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 245.

3 See para 653 et seq post.

4 See *Re Cole (a bankrupt), ex p Trustee of Property of Bankrupt* [1964] Ch 175, [1963] 3 All ER 433, CA; and see *Glaister-Carlisle v Glaister-Carlisle* (1968) 112 Sol Jo 215, CA. If a husband's act in itself is equivocal, ie if it is consistent equally with the husband's intention to transfer chattels to his wife or with an intention on his part to retain possession but to give the use and enjoyment of the chattels to his wife, the act does not constitute delivery: *Re Cole (a bankrupt), ex p Trustee of Property of Bankrupt* supra at 192, 440. See further GIFTS vol 52 (2009) PARA 205.

5 See para 404 ante. A lump sum order under the Matrimonial Causes Act 1973 s 23 (as amended) can be made against a bankrupt but only where the court has a clear information as to the assets, liabilities and expenses in the bankruptcy and where there will be a surplus to which the bankrupt will become entitled in the foreseeable future, out of which a lump sum could be paid: *Hellyer v Hellyer* [1997] 1 FCR 340, [1997] BPIR 85, CA. Similarly, a periodical payments order under the Matrimonial Causes Act 1973 s 23 (as amended) may be made against a bankrupt; but the available income will be subject to any income payments order made under the Insolvency Act 1986 s 310 (as amended): *Albert v Albert (a bankrupt)* [1997] 2 FLR 791, [1996] BPIR 232, CA. A property adjustment order under the Matrimonial Causes Act 1973 s 24 (as amended) cannot be made against a bankrupt in respect of property vested in his trustee: *Hellyer v Hellyer* supra; *McGladdery v McGladdery* [2000] 1 FCR 315, [2000] BPIR 1078, CA. As to lump sum orders see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 476 et seq; as to periodical payments orders see MATRIMONIAL AND CIVIL

PARTNERSHIP LAW vol 72 (2009) PARA 458 et seq; and as to property adjustment orders see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 498 et seq.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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### **(iii) Trust Property**

#### **428. Property held on trust.**

The property comprised in the bankrupt's estate does not include property held by him on trust for any other person<sup>1</sup>. The reason for this exclusion is that property held by a bankrupt on trust for another person is not the beneficial interest of the bankrupt, and is not, therefore, property which, according to the general principles of bankruptcy law, could be divisible among his creditors<sup>2</sup>. When a bankrupt holds property on trust for other persons and has no beneficial interest in it himself, he has only a legal estate comprising none of the qualities of property divisible among creditors<sup>3</sup>; if he holds property on trust both for himself and for other persons, then the beneficial interest which he has in that property is divisible among his creditors<sup>4</sup>.

A bankrupt who is a trustee for sale remains such a trustee notwithstanding his bankruptcy, unless and until he retires or is removed<sup>5</sup>.

Property held by the bankrupt as executor or administrator or in any fiduciary capacity is property held on trust within the meaning of the bankruptcy legislation<sup>6</sup>. Money held by a person in a fiduciary position is considered to belong to the person for whom he holds it<sup>7</sup>.

1 See the Insolvency Act 1986 s 283(3)(a); and para 216 note 1 ante. The client account of a bankrupt solicitor is property held by the bankrupt on trust for another, and so does not vest in the trustee in bankruptcy: *Re A Solicitor* [1952] Ch 328, [1952] 1 All ER 133. For a case where a lease was held in the joint names of the bankrupt and his wife, and the question was whether the presumption of advancement arose, see *Tew v Tew's Trustee* (1968) 207 Estates Gazette 1111, DC.

2 See *Re Elford, ex p Gennys* (1829) Mont & M 258; *Boddington v Castelli* (1853) 1 E & B 879; *Winch v Keeley* (1787) 1 Term Rep 619; *Re Bell, ex p Debtor* (1908) 99 LT 939 (where it was held, in the case of an implied trust, that the trustee in bankruptcy could not take property which the debtor honestly considered he held on trust).

3 *Scott v Surman* (1742) Willes 400 at 402.

4 It is doubtful whether, in cases where the bankrupt has a beneficial interest and is also a trustee, the legal estate does not pass. Where there is an express trust, it seems that the legal estate does not pass; but, where the trust is an implied or constructive one, the legal estate may pass to the trustee in bankruptcy, who will hold it as trustee for the creditors and the other persons interested: see *Carvalho v Burn* (1833) 4 B & Ad 382 at 393; affd sub nom *Burn v Carvalho* 1 Ad & El 883 at 893. See also *Re McCarthy (a bankrupt), ex p Trustee of Bankrupt v McCarthy* [1975] 2 All ER 857, [1975] 1 WLR 807. Cf Lewin on Trusts (17th Edn) paras 22-14, 22-15.

As to the position of a trustee of leaseholds on his bankruptcy, and as to the rights of his trustee in bankruptcy, see *Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 271, CA. See also *Re Richardson, ex p Governors of St Thomas's Hospital* [1911] 2 KB 705, CA (money recovered under a right of indemnity which the bankrupt, as a trustee, had against the principal debtor, could not be treated as assets in the bankruptcy); considered in *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617, CA; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476, CA; *Re Harrington Motor Car Co, ex p Chaplin* [1928] Ch 105, CA, and *Hood's Trustees v Southern Union General Insurance Co of Australasia* [1928] Ch 793, CA. The law as laid down in the last two cases, that an injured party was not subrogated to the rights under an insurance policy of the person responsible for the injury in the event of that person's insolvency, was altered by the Third Parties (Rights against Insurers) Act 1930: see para 420 ante; and INSURANCE vol 25 (2003 Reissue) para 679 et seq. *Re Richardson, ex p Governors of St Thomas's Hospital* supra was applied in *Selangor United Rubber Estates Ltd v Cradock* [1967] 2 All ER 1255, [1967] 1 WLR 1168. See also para 420 ante.

Where a husband effected an insurance policy on his life 'for the benefit of his wife' in pursuance of the Married Women's Property Act 1870 (repealed), it was held that the interest in the policy money vested on the husband's bankruptcy in the trustee, subject only to the trust in favour of any wife who should, by surviving him, become his widow (*Re Collier* [1930] 2 Ch 37); but in *Cousins v Sun Life Assurance Society* [1933] Ch 126, CA (where a husband had effected an insurance policy on his life for the benefit of his named wife under the Married Women's Property Act 1882 s 11 (as amended)), *Re Collier* supra was doubted and the benefit of the policy was held not to pass to the trustee in the husband's bankruptcy.

5 *Re Solomon (a bankrupt), ex p Trustee of Property of Bankrupt v Solomon* [1967] Ch 573 at 579, sub nom *Re A Debtor, ex p Trustee v Solomon* [1966] 3 All ER 255 at 257.

6 An executor who carries on the trade of his testator under testamentary directions is personally liable for debts so incurred, but has a right to be indemnified out of the testator's assets (*Dowse v Gorton* [1891] AC 190, HL), and has a lien on the assets of the business, which lien passes to his trustee (*Jennings v Mather* [1902] 1 KB 1, CA (trustee under creditors' deed)). If the executor is in default, he is not entitled to an indemnity, except on the terms of making good his default, and his creditors will be in no better position: *Re Johnson, Shearman v Robinson* (1880) 15 ChD 548. If one of several executors is in default, the executors who are not in default are entitled to an indemnity: *Re Frith, Newton v Rolfe* [1902] 1 Ch 342. See further EXECUTORS AND ADMINISTRATORS.

7 *Pennell v Deffell* (1853) 4 De GM & G 372; *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696, CA; *Re Mawson, ex p Hardcastle* (1881) 44 LT 523; *Taylor v Plumer* (1815) 3 M & S 562 at 574; *Frith v Cartland* (1865) 2 Hem & M 417; *Pinkett v Wright* (1842) 2 Hare 120; *Re Strachan, ex p Cooke* (1876) 4 ChD 123, CA; *Harris v Truman* (1882) 9 QBD 264, CA; *Gibert v Gonard* (1884) 52 LT 54. The same principle applies to property bought with stolen money: *Re Hulton, ex p Manchester and County Bank* (1891) 8 Morr 69, DC. In a case decided under Indian bankruptcy law, money invested in a firm for the benefit of a minor was held to have passed to the official assignee on members of the firm being adjudicated insolvent, but the beneficiary was held entitled to a charge on its assets for the money: *Madras Official Assignee v Krishnaji Bhat* (1933) 49 TLR 432, PC. As to the following of assets generally see EQUITY vol 16(2) (Reissue) para 861 et seq.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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### **429. Legal estate in settled land.**

For the purposes of determining, where the estate owner of any settled land<sup>1</sup> is bankrupt, whether the legal estate in the settled land is comprised in, or is capable of being claimed for, the bankrupt's estate, the legal estate in the settled land is deemed not to vest in the estate owner<sup>2</sup>, unless and until the estate owner becomes absolutely and beneficially entitled to the settled land free from all limitations, powers and charges taking effect under the settlement<sup>3</sup>.

1 For the meaning of 'settled land' see the Settled Land Act 1925 ss 2, 117(1)(xxiv); and SETTLEMENTS vol 42 (Reissue) para 678 note 1.

2 For the meaning of 'estate owner' see *ibid* s 117(1)(xi); the Law of Property Act 1925 s 1(4); and SETTLEMENTS vol 42 (Reissue) para 697 note 3.

3 Settled Land Act 1925 s 103 (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 3). As to the trustee's power to apply under the Settled Land Act 1925 s 24 (see SETTLEMENTS vol 42 (Reissue) para 765) for the exercise of the powers under the 1925 Act see *Re Thornhill's Settlement* [1941] Ch 24, [1940] 4 All ER 249, CA; and para 404 ante. Since 1 January 1997 it has not been possible to create settlements for the purposes of the Settled Land Act 1925, save in a very limited class of cases: see SETTLEMENTS vol 42 (Reissue) paras 606, 675 et seq.

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#### **430. Property in factor's possession.**

A factor or mercantile agent entrusted with the possession as well as the disposal of goods is a trustee of the goods, and on his bankruptcy they will not pass to his trustee, but will belong to his principal<sup>1</sup>. Nevertheless, the factor has a general lien on them for any debts due to him from the principal on the general account between them, and this lien passes to the factor's trustee in bankruptcy<sup>2</sup>.

If goods are sold by a factor, the price belongs to the principal, subject to the factor's lien; and, if the principal for whom the factor has sold goods becomes bankrupt, the factor is entitled to his lien as against the principal's trustee in bankruptcy<sup>3</sup>. If the factor receives the price of the goods and becomes bankrupt, the purchase money or its proceeds, if they can be identified, will be the principal's property, and will not pass to the factor's trustee<sup>4</sup>, except where the money has been mixed with the factor's money and is indistinguishable<sup>5</sup>.

A person who receives goods from another and is entitled to sell them on any terms he pleases, but is bound to pay the consignor a fixed price at a fixed time, sells the goods on his own account, even though he describes himself as agent; and the consignor cannot follow the purchase money, which passes to the seller's trustee in bankruptcy<sup>6</sup>.

1 *Godfrey v Furzo* (1733) 3 P Wms 185; *Re Jullian, ex p Dumas* (1754) 2 Ves Sen 582 at 585; *Tooke v Hollingworth* (1793) 5 Term Rep 215 at 227 (affd sub nom *Hollingworth v Tooke* (1795) 2 Hy Bl 501); *Barber & Sons v Rigley* (1922) 38 TLR 650 (transfer of shares bought by broker for client). Brokers (ie mercantile agents who are employed to sell goods without being put in possession of goods) may be in the position of trustees as regards money which they receive. A broker who is instructed to sell stock and invest the proceeds in a specified way is an agent into whose hands money is put to be applied in a particular way, and money so paid to him can be followed by a customer: *Re Strachan, ex p Cooke* (1876) 4 ChD 123, CA. Where the account is a speculative one, the relation may be merely that of creditor and debtor, and in such a case money in the hands of the broker would pass, on his bankruptcy, to his trustee: *King v Hutton* [1900] 2 QB 504, CA. See further AGENCY vol 1 (2008) PARA 141.

2 As to factor's lien see *Drinkwater v Goodwin* (1775) 1 Cowp 251; *Frith v Forbes* (1862) 4 De GF & J 409; *Brown, Shipley & Co v Kough* (1885) 29 ChD 848, CA; *Stevens v Biller* (1883) 25 ChD 31, CA. See further AGENCY vol 1 (2008) PARA 114; BAILMENT vol 3(1) (2005 Reissue) paras 48-49.

3 *Drinkwater v Goodwin* (1775) 1 Cowp 251.

4 *Taylor v Plumer* (1815) 3 M & S 562; *Harris v Truman* (1882) 9 QBD 264, CA.

5 *Taylor v Plumer* (1815) 3 M & S 562 at 575. For a consideration of the rights in equity to trace money into a banking account see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 857; and as to following trust money generally see EQUITY vol 16(2) (Reissue) para 861 et seq.

6 *Re Neville, ex p White* (1871) 6 Ch App 397; affd sub nom *Towle & Co v White* 29 LT 78, HL. It is a question of fact whether a person sells as agent or as principal. There is nothing to prevent the principal from remunerating the agent by a commission varying according to the amount of the profit obtained by the sale, or to prevent his paying a commission depending on the surplus which the agent can obtain over and above the price which will satisfy the principal; the amount of the commission does not turn the agent into a purchaser: *Re Smith, ex p Bright* (1879) 10 ChD 566 at 570, CA. See also *Re Cotton, ex p Cooke* (1913) 108 LT 310, CA (sale by auctioneer); and AGENCY vol 1 (2008) PARA 1.

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#### **431. Property entrusted for specific purpose.**

Property which is in the bankrupt's possession for a specific purpose does not, as a general rule, pass to the trustee, but is clothed with a species of trust and is subject to the same principles as trust property<sup>1</sup>.

If bills of exchange and promissory notes, which are ordinarily delivered and remitted as cash, are specifically appropriated to a particular purpose, the owner will be entitled to have them restored to him if they remain in the bankrupt's hands at the time of bankruptcy, or will be entitled to the money received on them if the trustee in bankruptcy disposes of them<sup>2</sup>.

1 *Re Brickwood, ex p Waring, Re Bracken, ex p Inglis* (1815) 19 Ves 345; *Re Manning, ex p Smith* (1834) 4 Deac & Ch 579; *Re Warwick and Clagett, ex p Brown* (1838) 3 Mont & A 471; *Steele v Stuart* (1866) LR 2 Eq 84;

*Re Angerstein, ex p Angerstein* (1874) 9 Ch App 479; *Re Rogers, ex p Holland and Hannen* (1891) 8 Morr 243, CA; *Re Drucker, ex p Basden* [1902] 2 KB 237, CA; *Re Gothenburg Commercial Co* (1881) 44 LT 166, CA; *Re Watson, ex p Schipper* (1912) 107 LT 783, CA; *Bank of Scotland v Macleod* [1914] AC 311, HL (debenture, agreed to be assigned by company, held not clothed with a species of trust but to pass to the liquidator); *Re Hooley, ex p Trustee* (1915) 84 LJB 1415.

In *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL, this principle was applied to a sum of money lent to a company (later wound up) for a specific purpose which was not implemented; the money, being still identifiable, was held to be impressed with a trust, and accordingly did not enure for the benefit of the general body of creditors, but was recoverable by the lender.

Unappropriated parcels of shares agreed to be held by the vendor on trust for the buyer will not accrue to the benefit of the general body of creditors in the vendor's bankruptcy: *Hunter v Moss* [1994] 3 All ER 215, [1994] 1 WLR 452, CA; *Re Harvard Securities Ltd (in liquidation), Holland v Newbury* [1997] 2 BCLC 369.

The trustee in bankruptcy will not be personally liable in respect of property received by the bankrupt for a specific purpose, unless it is shown that the property came into the trustee's possession with a knowledge of the purposes for which it was destined: *Kieran v Johnson* (1815) 1 Stark 109.

2 *Re Power and Warwick, ex p Smith* (1819) Buck 355; *Hollingworth v Tooke* (1795) 2 Hy BI 501; *Re Foster, ex p Bond* (1840) 1 Mont D & De G 10; *Re Wise, ex p Atkins* (1842) 3 Mont D & De G 103; *Re Broad, ex p Neck* (1884) 13 QBD 740; *Re Suse, ex p Dever* (1884) 13 QBD 766, CA; *Phelps, Stokes & Co v Comber* (1885) 29 ChD 813, CA; *Re Yglesias, ex p Gomez* (1875) 10 Ch App 639; *Re Brown, ex p Plitt* (1889) 6 Morr 81.

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#### **432. Bills sent for collection.**

Bills which are remitted by a customer to a banker, and which are not carried by the banker to the customer's credit until the proceeds are received, will not, if undisposed of before bankruptcy, pass on the banker's bankruptcy to the trustee, but will belong to the customer subject to the banker's lien, being treated as sent to the banker merely for the purpose of obtaining payment when due<sup>1</sup>.

If there is a contract express or implied between the banker and the customer that bills transmitted by the customer should be treated as cash, they will, on the banker's bankruptcy, belong to the trustee<sup>2</sup>.

1 *Re Burrough, ex p Sollers* (1811) 1 Rose 155; *Re Boldero, ex p Pease* (1812) 1 Rose 232; *Thompson v Giles* (1824) 2 B & C 422; *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194; *Re Mills, Bawtree & Co, ex p Stannard* (1893) 10 Morr 193. If the banker discounts a bill of this kind, or advances money on it, he will be entitled in the one case to the whole property in the bill, in the other to a lien on it for the advance: *Giles v Perkins* (1807) 9 East 12 at 14; *Carstairs v Bates* (1812) 3 Camp 301; *Re Boldero, ex p Pease* supra; *Re Wood, ex p M'Gae* (1816) 19 Ves 607; *Hornblower v Proud* (1819) 2 B & Ald 327; *Re Dilworth, ex p Benson* (1832) Mont & B 120. See generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 861, 862, 988.

2 *Re Brickwood, ex p Waring, Re Bracken, ex p Inglis* (1815) 19 Ves 345.



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**433. Rule in *ex parte Waring*.**

If both the customer and the banker are insolvent and the customer has deposited with the banker bills or goods to cover his acceptances, the holder of the acceptances will be entitled to have the bills or goods applied in the discharge of the acceptances<sup>1</sup>, not because the holder of the bills has any lien on the bills or goods deposited with the banker or any equity to have them so applied, but in order to work out the equities between the two insolvent estates<sup>2</sup>.

<sup>1</sup> *Re Brickwood, ex p Waring, Re Bracken, ex p Inglis* (1815) 19 Ves 345. This is known as 'the rule in *Waring's Case*'. See also *Re Suse, ex p Dever* (1885) 14 QBD 611 at 620, CA per Brett MR ('Where as between the drawer and acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor, then, if both drawer and acceptor become insolvent and their estates are brought under a forced administration, the billholder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied in or towards payment of the bill.').

As to the application of the rule see *Powles v Hargreaves* (1853) 3 De GM & G 430; *Re New Zealand Banking Corp'n, Hickie & Co's Case* (1867) LR 4 Eq 226; *Trimingham v Maud* (1868) LR 7 Eq 201; *Re Joint Stock Discount Co, Loder's Case* (1868) LR 6 Eq 491; *Re New Zealand Banking Corp'n, Levi & Co's Case* (1869) LR 7 Eq 449; *Re General Rolling Stock Co, ex p Alliance Bank* (1869) 4 Ch App 423; *City Bank v Luckie* (1870) 5 Ch App 773; *Re Richardson, ex p Smart* (1872) 8 Ch App 220; *Re Leggatt, Re Gledstanes, ex p Dewhurst* (1873) 8 Ch App 965; *Vaughan v Halliday* (1874) 9 Ch App 561; *Re BARNED'S BANKING CO, ex p Joint Stock Discount Co* (1875) 10 Ch App 198; *Re Lindsay, ex p Lambton* (1875) 10 Ch App 405; *Re Yglesias & Co, ex p General South American Co* (1875) 10 Ch App 635; *Re Yglesias, ex p Gomez* (1875) 10 Ch App 639; *Re Tappenbeck, ex p Banner* (1876) 2 ChD 278, CA; *Re Entwistle, ex p Arbuthnot* (1876) 3 ChD 477, CA; *Royal Bank of Scotland v Commercial Bank of Scotland* (1882) 7 App Cas 366, HL (where the rule was criticised).

<sup>2</sup> *Re Burrough, ex p Sargeant* (1810) 1 Rose 153; and see *Ex p Twogood* (1812) 19 Ves 229; *Re Boldero, ex p Leeds Bank* (1812) 1 Rose 254; *Thompson v Giles* (1824) 2 B & C 422; *Re Dilworth, ex p Armitstead* (1828) 2 Gl & J 371; *Re Dilworth, ex p Thompson* (1828) Mont & M 102; *Re Dilworth, ex p Benson* (1832) Mont & B 120; *Re Forster, ex p Bond* (1840) 1 Mont D & De G 10; *Re Wise, ex p Edwards* (1842) 2 Mont D & De G 625; *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194.

**UPDATE****390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(iv) Proceedings by or against Trustee/434. Rights or causes of action.

#### **(iv) Proceedings by or against Trustee**

##### **434. Rights or causes of action.**

Certain rights or causes of action are included in the property of a bankrupt which vests in his trustee in bankruptcy<sup>1</sup>. These the trustee may enforce as a litigant, independently of any provisions in the bankruptcy legislation<sup>2</sup>. The trustee is also liable in certain cases to be made or joined as a defendant in actions by other parties<sup>3</sup>.

Where an undischarged bankrupt is a contractor in respect of any contract liability with another person, that person may sue or be sued in respect of the contract without the joinder of the bankrupt<sup>4</sup>.

1 *Re Byrne, ex p Henry* (1892) 9 Morr 213 (action for commission); *Re Perkins, Poyser v Beyfus* [1898] 2 Ch 182, CA (right to sue on covenant of indemnity given to bankrupt); *Wolff v Van Boonen* (1906) 94 LT 502 (right to set aside settlement); and see *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476, CA. As to these categories of rights or causes of action which vest in the trustee see para 435 et seq post; and as to other categories of rights or causes of action which remain vested in the bankrupt see para 435 note 13 post.

2 *Leeming v Lady Murray* (1879) 13 ChD 123.

3 *London School Board v Wall Bros* (1891) 8 Morr 202, CA; *Re Sykes, Jaram v Holmes* (1909) 100 LT 265; *Mulkerrins v PriceWaterhouseCoopers (a firm)* [2000] BPIR 506; affd [2001] BPIR 106, CA (trustee liable to be joined as a co-defendant in bankrupt's negligence action).

4 Insolvency Act 1986 s 345(4). See also para 677 post. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 345 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

#### **UPDATE**

##### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

##### **434 Rights or causes of action**

NOTE 3--*Mulkerrins*, cited, reversed: [2003] UKHL 41, [2003] 1 WLR 1937.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11)

## ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(iv) Proceedings by or against Trustee/435. Causes of action vesting in trustee.

### 435. Causes of action vesting in trustee.

All rights of action which relate directly to property comprised in the bankrupt's estate<sup>1</sup> pass to the trustee<sup>2</sup>. It is the function of the trustee to get in, realise and distribute the bankrupt's estate<sup>3</sup>; and, in carrying out that function and in the management of the bankrupt's estate, the trustee is entitled<sup>4</sup> to use his discretion<sup>5</sup>. Where a cause of action arises after the commencement of the bankruptcy<sup>6</sup>, it constitutes after-acquired property<sup>7</sup> of which the bankrupt must give notice to the trustee<sup>8</sup> and which may be claimed for the estate by the trustee<sup>9</sup>. Where the right of action has passed to the trustee, if the bankrupt brings an action on it, it may be dismissed as frivolous or vexatious<sup>10</sup> or the trustee may intervene and be joined or substituted as claimant<sup>11</sup>. A bankrupt has no locus standi to bring an appeal against the judgment on which the petition debt is founded<sup>12</sup>.

Where a cause of action arises in respect of the bankrupt's personal injury, personal inconvenience or damage to reputation, the right of action remains with the bankrupt<sup>13</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 As to the general principles on which it is determined whether a right of action does or does not pass to the trustee see *Rose v Buckett* [1901] 2 KB 449 at 454, CA; *Drake v Beckham* (1843) 11 M & W 315 (affd sub nom *Beckham v Drake* (1849) 2 HL Cas 579 at 596, 627). As to what are sometimes known as 'mixed actions' or 'hybrid claims', including damage or loss both to the bankrupt's property and to the bankrupt personally, see para 436 post. If a trustee chooses not to adopt the right of action, the bankrupt may ask the trustee to assign it back to him: *Hamilton v Official Receiver* [1998] BPIR 602 (where the trustee refuses to assign, the bankrupt may apply for a direction under the Insolvency Act 1986 s 303(1) (see para 344 ante) that the trustee do so); cf *Osborn v Cole* [1999] BPIR 251.

Actions which pass to the trustee include the following: actions for breaches of contracts to deliver goods (*Wright v Fairfield* (1831) 2 B & Ad 727; *Stanton v Collier* (1854) 23 LJQB 116, CA), or to repair (*Gibbon v Dudgeon* (1881) 45 JP 748), or to indemnify (*Re Perkins, Poyser v Beyfus* [1898] 2 Ch 182, CA; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476, CA), or to provide funds to meet a bill of exchange (*Hill v Smith* (1844) 12 M & W 618), or to pay debts on the sale of a business (*Ashdown v Ingamells* (1880) 5 ExD 280, CA); for money earned by a bankrupt other than 'personal earnings' eg commission (*Re Byrne, ex p Henry* (1892) 9 Morr 213), or architect's remuneration (*Emden v Carte* (1881) 17 ChD 768, CA); for earnings in excess of what is necessary for the maintenance of the bankrupt and his family (*Mercer v Vans Colina* (1897) [1900] 1 QB 130n); for the return of premiums paid on an insurance policy (*Boddington v Castelli* (1853) 1 E & B 879); for wrongful dismissal (*Beckham v Drake* (1849) 2 HL Cas 579); for trespass or negligence causing injury to the bankrupt's property (*Wetherell v Julius* (1850) 10 CB 267; *Morgan v Steble* (1872) LR 7 QB 611; *Wilson v United Counties Bank Ltd* [1920] AC 102, HL), or involving the bankrupt in pecuniary liability (*Porter v Vorley* (1832) 9 Bing 93); for misrepresentation (*Hodgson v Sidney* (1866) LR 1 Exch 313); for fraud (*Motion v Moojen* (1872) LR 14 Eq 202); for conspiracy, resulting in mental and physical distress and loss of reputation (*Wenlock v Moloney* (1967) 111 Sol Jo 437, CA; but see para 436 note 2 post); for relief against a usurious bargain (*Payne v Dicker* (1871) 24 LT 492; on appeal 6 Ch App 578), or against forfeiture (*Howard v Fanshawe* [1895] 2 Ch 581); for a declaration that an absolute conveyance should stand only as a security (*Seear v Lawson* (1880) 15 ChD 426, CA); and for reopening accounts of the sale of goods and the recovery of sums found to be due on the accounts (*Guy v Churchill* (1888) 40 ChD 481).

3 Ie in accordance with the Insolvency Act 1986 Pt IX Ch IV (ss 305-335) (as amended).

4 Ie subject to ibid Pt IX Ch IV (ss 305-335) (as amended).

5 See ibid s 305(2); and para 456 post.

6 As to the commencement of bankruptcy see para 213 ante.

7 See para 445 et seq post.

8 Ie under the Insolvency Act 1986 s 333(2): see para 447 post.

9 Ie under ibid s 307: see para 445 et seq post.

10 *Metropolitan Bank v Pooley* (1885) 10 App Cas 210, HL. As to summary judgment see CPR Pt 24; and CIVIL PROCEDURE vol 11 (2009) PARA 524 et seq. In *Kellaway v Bury* (1892) 66 LT 599 at 602, CA, Lindley LJ said that the power to dismiss was a very strong power, and should only be exercised in cases which are clear and beyond all doubt; the court must see that the claimant has no case at all. See also *Boaler v Power* [1910] 2 KB 229, CA (where the trustee refused to continue an action begun by the bankrupt, which the master subsequently dismissed on the defendant's application; it was held that the bankrupt had no locus standi to appeal from the decision), applied in *Heath v Tang, Stevens v Peacock* [1993] 4 All ER 694, [1993] 1 WLR 1421, CA.

11 See under CPR 19.2(4): see CIVIL PROCEDURE vol 11 (2009) PARA 213. See also *Affleck v Hammond* [1912] 3 KB 162; *Jameson & Co v Brick and Stone Co Ltd* (1879) 4 QBD 208; *Bailey v Thurston & Co Ltd* [1903] 1 KB 137, CA; *Re Wilson, ex p Vine* (1878) 8 ChD 364, CA; *Trustee of Property of Lord v Great Eastern Ry Co* [1908] 1 KB 195; *Rose v Buckett* [1901] 2 KB 449, CA.

12 *Heath v Tang, Stevens v Peacock* [1993] 4 All ER 694, [1993] 1 WLR 1421, CA (the bankrupt may only pursue such an appeal through the trustee either by consent or by order of the court). See further *Royal Bank of Scotland v Farley* [1996] BPIR 638, CA.

13 Actions which remain with the bankrupt include the following: actions for wages or 'personal earnings' where these are no more than sufficient for the bankrupt's maintenance (see para 437 post); negligence causing personal injury, or assault (see *Drake v Beckham* (1843) 11 M & W 315 at 319; affd sub nom *Beckham v Drake* (1849) 2 HL Cas 579); for slander (*Benson v Flower* (1629) W Jo 215); for trespass, where the only grievance is personal annoyance to the bankrupt (*Clark v Calvert* (1819) 8 Taunt 742; *Brewer v Dew* (1843) 11 M & W 625; *Rogers v Spence* (1846) 12 Cl & Fin 700, HL; *Rose v Buckett* [1901] 2 KB 449, CA); for negligence or breach of duty on the part of a solicitor causing personal annoyance, such as restraint of the person (*Wetherell v Julius* (1850) 10 CB 267); for injury to credit (*Wilson v United Counties Bank Ltd* [1920] AC 102, HL); and see *Heath v Tang, Stevens v Peacock* [1993] 4 All ER 694, [1993] 1 WLR 1421, CA).

If a bankrupt brings such an action and obtains damages, the trustee cannot intervene in the action and obtain an order for the payment of the amount of damages to him (*Re Wilson, ex p Vine* (1878) 8 ChD 364, CA; and see para 436 post); but it is possible that, if the sum awarded is more than is needed for the maintenance of the bankrupt and his family, the trustee could call on the bankrupt to account to him for the surplus (cf *Re Graydon, ex p Official Receiver* [1896] 1 QB 417; *Re Ashby, ex p Wreford* [1892] 1 QB 872; *Re Roberts* [1900] 1 QB 122, CA).

A bankrupt whose adjudication has not been set aside cannot bring an action against a person for maliciously procuring the adjudication: *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210, HL; and see *Beechey v William Hill (Park Lane) Ltd* [1956] CLY 5442.

A bankrupt has locus standi to resist possession proceedings taken by a mortgagee: *Nationwide Building Society v Purvis* [1998] BPIR 625, CA.

## UPDATE

### 390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 435 Causes of action vesting in trustee

NOTE 2--An action for unfair dismissal is a personal right since it reflects an aspect of a person's individuality and as a result it does not vest in the trustee in bankruptcy: *Grady v Prison Service* [2003] EWCA Civ 527, [2003] 3 All ER 745. An action for racial discrimination will not vest in the trustee in bankruptcy provided it is limited to a claim for a declaration of discriminatory conduct under the Race Relations Act 1976 s 56(1) (a) and/or a claim for injury to feelings under s 57(4) (see DISCRIMINATION vol 13 (2007 Reissue) PARAS 499-500): *Khan v Trident Safeguards Ltd* [2004] EWCA Civ 624, [2004] ICR 1591. See also *Miller (as trustee in bankruptcy of Bayliss) v Bayliss* [2009] EWHC 2063 (Ch), [2009] BPIR 1438, [2009] All ER (D) 83 (Aug).

NOTE 12--See *Dadourian Group International Inc v Simms* [2008] EWHC 723 (Ch), [2008] BPIR 508 (prior to appointment of trustee, court might have discretion to allow bankrupt to appeal).

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#### **436. Transactions involving damage to person and property.**

Where two separate and distinct causes of action arise from the same transaction, resulting both in substantial damage to the bankrupt's property and in injury to the bankrupt personally, the trustee is entitled to the right of action for damage to the property, and the bankrupt retains his right to sue for the personal injury<sup>1</sup>; but, where there is but one cause of action resulting in direct loss to the property, to which the bankrupt's personal injury is only incidental, the right of action may not be split, but passes to the trustee<sup>2</sup>, unless it gives rise to the possible award of aggravated damages<sup>3</sup> to the bankrupt, in which case the cause of action remains with him<sup>4</sup>.

1 *Boddington v Castelli* (1853) 1 E & B 879; *Wilson v United Counties Bank Ltd* [1920] AC 102, HL. As to the apportionment of agreed damages paid in settlement of a bankrupt's claim arising out of both personal injury and injury to property see *Re Kavanagh, ex p Bankrupt v Jackson (Trustee)* [1950] 1 All ER 39n, DC.

2 *Ord v Upton* [2000] Ch 352, sub nom *Ord v Upton (as trustee to the property of Ord)* [2000] 1 All ER 193, CA (a claim for damages for injury to body and mind and for capacity to earn was in part personal and in part related to property and as such vested solely in the trustee, although he would hold any award for pain and suffering on constructive trust for the bankrupt); *Mulkerrins v PriceWaterhouseCoopers (a firm)* [2000] BPIR 506; affd [2001] BPIR 106, CA (in a hybrid claim the bankrupt had no title to sue the defendant in the absence of an assignment of the entire right of action by the trustee in bankruptcy). See also *Stanton v Collier* (1854) 23 LJQB 116, CA; *Hodgson v Sidney* (1866) LR 1 Exch 313 at 316; *Morgan v Steble* (1872) LR 7 QB 611; and see *Beckham v Drake* (1849) 2 HL Cas 579 at 629; *Rogers v Spence* (1846) 12 Cl & Fin 700 at 720, HL; *Rose v Buckett* [1901] 2 KB 449, CA; *Wilson v United Counties Bank Ltd* [1920] AC 102, HL (where the question of what happens when one and the same cause of action gives rise both to substantial damage to property and also to injury to the person was left undecided). See also *Wenlock v Moloney* (1967) 111 Sol Jo 437, CA (claim for damages for conspiracy to injure plaintiff in business and property; although consequences were mental distress and loss of reputation, those were not separate heads of damage (see para 435 note 2 ante); claim passed to trustee). For earlier proceedings see *Wenlock v Moloney* [1965] 2 All ER 871, [1965] 1 WLR 1238, CA.

3 As to the nature of those damages see *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL.

4 See *Brewer v Dew* (1843) 11 M & W 625; *Howard v Crowther* (1841) 8 M & W 601; *Rose v Buckett* [1901] 2 KB 449 at 456, CA; *Lord's Trustee v Great Eastern Rly Co* [1908] 1 KB 195 at 202; on appeal (without further expression of opinion on this point), [1908] 2 KB 54, CA; revsd sub nom *Great Eastern Rly Co v Lord's Trustee* [1909] AC 109, HL.

#### **UPDATE**

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## 436 Transactions involving damage to person and property

NOTE 2--*Mulkerrins*, cited, reversed: [2003] UKHL 41, [2003] All ER (D) 549 (Jul).

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### 437. Contracts for personal services.

Where the bankrupt's personal skill and labour are the basis of a contract, the right of action for breach of the contract passes to the trustee:

- 602 (1) where the breach has occurred before the bankruptcy, and money is recoverable by the bankrupt as damages for the breach; or
- 603 (2) where the bankrupt has completed the contract during the bankruptcy and money on the contract has become due<sup>1</sup>, and the trustee has claimed the money on behalf of the bankrupt's estate<sup>2</sup>, or has obtained an income payments order in respect of it, or which includes it<sup>3</sup>.

Otherwise the right to sue for money recoverable as damages for a breach of the contract occurring after the commencement of the bankruptcy may be exercised by the bankrupt and he may retain the amount recovered, subject to his notifying the trustee as to its recovery and amount<sup>4</sup>. The trustee may then claim the damages for the bankrupt's estate, except in so far as such damages are required for meeting the reasonable domestic needs of the bankrupt and his family<sup>5</sup>.

1 He has become due after the commencement of the bankruptcy. As to the commencement of bankruptcy see para 213 ante.

2 He under the Insolvency Act 1986 s 307: see para 445 et seq post. If the money or damages do not constitute income (see s 310(7) (as amended); and para 449 note 2 post), such money or damages must be claimed by way of an income payments order: see text and note 3 infra.

3 He under *ibid* s 310 (as amended): see para 449 et seq post.

4 As to the bankrupt's duty to notify the trustee of any property which he acquires or which devolves on him or of any increase in his income after the commencement of his bankruptcy see *ibid* s 333(2); and paras 447, 455 post.

5 See *ibid* s 310(2); and para 449 post. Section 310(2) relates only to income payments orders and not to property. The definition of income in s 310(7) (as amended) is, however, probably sufficiently wide to cover all sums awarded by order of the court, whether damages or otherwise, in respect of claims brought in respect of contracts for personal services. It is in any event a basic principle of bankruptcy law that the bankrupt should not be deprived of those fruits of his personal exertions which are necessary to enable him to live: see *Re Roberts* [1900] 1 QB 122 at 128, 129, CA; *King v Faraday & Partners Ltd* [1939] 2 KB 753, [1939] 2 All ER 478. Should the bankrupt invest or accumulate the proceeds of such an action, they may be claimed by the trustee: *Re Roberts* *supra*.

## UPDATE

### 390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **438. Personal torts.**

As a general rule<sup>1</sup>, damages obtained by a bankrupt in an action in respect of a personal injury or personal inconvenience or damage to reputation after his adjudication are not property which the trustee may claim for the estate<sup>2</sup>. Where, however, the bankrupt uses his damages to invest or purchase property, that investment may be claimed by the trustee<sup>3</sup>.

1 See, however, para 435 note 2 ante.

2 The Insolvency Act 1986 does not contain any provision to that effect. The definition of 'property' for the purposes of s 307 (trustee's right to claim after-acquired property for the estate: see para 445 et seq post) seems wide enough to cover such damages. However, the definition of 'property' in s 436 (see para 400 ante) is substantially the same as that contained in the Bankruptcy Act 1914 s 167 (repealed) and for the purposes of the law prior to 29 December 1986 (see para 2 ante) such damages were not treated as after-acquired property which passed automatically to the trustee: see *Re Job, ex p Graham* (1870) 21 LT 802; *Re Wilson, ex p Vine* (1878) 8 ChD 364, CA.

3 *Re Wilson, ex p Vine* (1878) 8 ChD 364, CA.

### **UPDATE**

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(iv) Proceedings by or against Trustee/439. Actions pending by or against bankrupt.

#### **439. Actions pending by or against bankrupt.**

An action does not abate by reason of the bankruptcy of a party, provided that the cause of action survives<sup>1</sup>. If the right of action which a bankrupt is enforcing is one which vests in his trustee, or is one which the trustee is entitled to enforce for the benefit of the creditors, the trustee may, on an application made by himself without notice being served on any other party, or by any party to the action, to the court in which the action is pending, alleging the

devolution of the right of action, become a party to the action in place of the bankrupt or as co-claimant<sup>2</sup>; but the bankrupt cannot himself continue the action alone<sup>3</sup>.

If the pending action is against the bankrupt, and it is not one which will be restrained or stayed on the ground that the claim on which it is founded is provable in the bankruptcy<sup>4</sup>, the trustee may be made a party as defendant on an application made by the claimant or by one of the other parties to the action without notice being served on any other party<sup>5</sup>. Whether the bankrupt is claimant or defendant, if the trustee becomes a party, he adopts the whole action as from the beginning, and may be liable for the whole of the costs if he is unsuccessful<sup>6</sup>; but, if he is simply made a party to any proceedings on the application of another party to the proceedings, he will not, in general, be personally liable for costs unless the court otherwise directs<sup>7</sup>.

Where a bankruptcy order has been made by the High Court or an interim receiver has been appointed or bankruptcy proceedings have been transferred to that Court from a county court, a judge of any Division of the High Court may, of his own motion, order the transfer to that Division of any proceedings brought by or against the bankrupt for the purpose of enforcing a claim against the bankrupt's estate, or brought by a person other than the bankrupt for the purpose of enforcing any such claim, including in either case proceedings of any description by a mortgagee, as are pending against the individual concerned either in another Division of the High Court or in a court in England and Wales other than the High Court<sup>8</sup>. Where proceedings are so transferred, the registrar may, subject to general or special directions of the judge, dispose of any matter arising in the proceedings which would, but for the transfer, have been disposed of in chambers or, in the case of proceedings transferred from a county court, by the district judge<sup>9</sup>.

1 CPR Sch 1, RSC Ord 15 r 7(1).

2 As to the substitution of the trustee see CPR 19.2(4); and CIVIL PROCEDURE vol 11 (2009) PARA 213. See also *Emden v Carte* (1881) 17 ChD 768, CA. A trustee who refuses to continue an action commenced by the bankrupt is not barred from beginning an action in his own name for the same relief: *Bennett v Gamgee* (1877) 46 LJQB 204, CA.

3 *Jackson v North Eastern Rly Co* (1877) 5 ChD 844, CA; *Eldridge v Burgess* (1878) 7 ChD 411; and see *Selig v Lion* [1891] 1 QB 513; *Pople v Evans* [1969] 2 Ch 255, [1968] 2 All ER 743. See also *Siroko v Murphy* [1955] IR 77. If one of two or more claimants is bankrupt, his trustee may be substituted as claimant: *Hoare & Co and Newton v Baker* (1887) 4 TLR 26, DC. As to whether the holding by the bankrupt of shares registered in his name confers rights, including rights of action, see para 422 ante.

4 A pending action against the bankrupt for a provable debt will continue unless expressly stayed under the Insolvency Act 1986 s 285(1), (2) (see para 218 ante) either by the bankruptcy court or by the court in which it is pending: *Réalisations Industrielles et Commerciales SA v Loescher & Partners* [1957] 3 All ER 241, [1957] 1 WLR 1026.

5 As to the procedure for adding and substituting parties see CPR 19.4; and CIVIL PROCEDURE vol 11 (2009) PARA 214.

6 *Watson v Holliday* (1882) 20 ChD 780 (affd 52 LJ Ch 543, CA); *Borneman v Wilson* (1884) 28 ChD 53, CA; *London School Board v Wall Bros* (1891) 7 TLR 566, CA; *Hill v Cooke-Hill* [1916] WN 61.

7 See the Insolvency Rules 1986, SI 1986/1925, r 7.39 (as substituted); and para 811 post.

8 See *ibid* r 7.15(1)-(3); and para 738 post. The court has a discretion (see *Re Somes, ex p Deller v Somes* (1895) 2 Mans 396); and the transfer ought not to be made unless it is shown that it will be of advantage to the bankrupt's estate (*Re Ross, ex p Trustee* (1888) 5 Morr 281; and as to the considerations which guide the court in making a transfer see *Re White & Co, ex p Official Receiver* (1884) 1 Morr 77; *Re Champagné, ex p Kemp* (1893) 10 Morr 285). For an instance of a transfer see *Re Kay and Lovell* [1941] Ch 420, [1941] 2 All ER 67 (partnership action; both partners adjudicated bankrupt).

9 See the Insolvency Rules 1986, SI 1986/1925, r 7.15(4); and para 738 post.

## UPDATE



### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(iv) Proceedings by or against Trustee/440. Trustee's powers as to proceedings.

#### **440. Trustee's powers as to proceedings.**

For the purpose of protecting the creditors of the bankrupt's estate<sup>1</sup> and the trustee himself, the trustee may, with the permission of the creditors' committee or the court, bring, institute or defend any action or legal proceedings relating to the property comprised in the bankrupt's estate<sup>2</sup>, and compromise any actions brought by or against him<sup>3</sup>.

These provisions apply only as between the trustee of the bankrupt's estate and the creditors; they do not preclude the trustee, as owner of a cause of action, from litigating it, or as defendant to an action from resisting it, without the consent of anyone<sup>4</sup>, or from compromising an action to which he is a party. An opposing litigant cannot plead, in answer to the claim or defence of a trustee in bankruptcy as such, that the trustee has not obtained the permission of the creditors' committee or the court to the institution or defence of the action. The effect of the provisions is that the trustee loses his right to be paid out of the bankrupt's estate the costs and expenses which he may have to pay or may incur in respect of such an action or proceeding, if he has not, before beginning, defending or compromising it, obtained such consent<sup>5</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 See the Insolvency Act 1986 s 314(1)(a), Sch 5 para 2; and para 460 head (2) post. As to ratification of the trustee's acts see para 464 post.

3 See *ibid* Sch 5 para 8; and para 443 head (3) post.

4 *Leeming v Lady Murray* (1879) 13 ChD 123; *Re Branson, ex p Trustee* [1914] 2 KB 701, approved in *Clark v Smith* [1940] 1 KB 126, [1939] 4 All ER 59, CA; and see *Re A Debtor (No 26A of 1975)* [1984] 3 All ER 995, [1985] 1 WLR 6.

5 *Re White, ex p Nichols* (1902) 46 Sol Jo 569; *Re Duncan, ex p Official Receiver* [1892] 1 QB 879, CA; and see *Re A Debtor (No 26A of 1975)* [1984] 3 All ER 995, [1985] 1 WLR 6 (trustee did not require permission under the Bankruptcy Act 1914 s 56 (repealed: see now the Insolvency Act 1986 Sch 5 Pt I (paras 1-8)) where the costs of litigation were going to be met either by the defendants or by the legal aid fund).

#### **UPDATE**

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **440 Trustee's powers as to proceedings**

TEXT AND NOTE 2--The trustee may also, with the permission of the creditor's committee or the court, bring legal proceedings under the Insolvency Act 1986 ss 339 (see PARA 653 et seq), 340 (see PARA 356 et seq) or 423 (see PARA 664 et seq): s 314(1)(a), Sch 5 para 2A (Sch 5 para 2A added by the Enterprise Act 2002 s 262).

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#### **441. Limit of expenditure.**

When giving the trustee permission to bring, defend or compromise proceedings<sup>1</sup>, the creditors' committee may limit the amount of money to be expended<sup>2</sup>. If this limit of expenditure is exceeded, or if the trustee has proceeded with an action or defence without first obtaining the required permission, he may in the first case lose his right to indemnity out of the estate for any expenses incurred by him in excess of the permitted limit, and in the second case lose his right to any indemnity at all<sup>3</sup>.

1 See para 440 ante.

2 *Re Duncan, ex p Official Receiver* [1892] 1 QB 879, CA.

3 *Re White, ex p Nichols* (1902) 46 Sol Jo 569; *Re Duncan, ex p Official Receiver* [1892] 1 QB 879, CA.

#### **UPDATE**

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **442. Trustee as litigant.**

Where a trustee brings or defends an action as a litigant, he is, as between himself and the other parties to the action, in the same position as any other litigant<sup>1</sup>, that is to say, he must

pay any debt, damages or costs which the other litigants recover against him out of his own pocket<sup>2</sup>, and must obtain reimbursement, if he is entitled to it, out of the bankrupt's estate<sup>3</sup>. Consequently, a prudent trustee should, before embarking on litigation as claimant or defendant, see that he has sufficient assets in hand for his indemnity, or else obtain an indemnity from the creditors<sup>4</sup>. Where, however, an action is brought against the official receiver or the trustee as representing the debtor's estate, or where the official receiver or the trustee is made a party to proceedings on the application of any other party, he will not be made personally liable for costs unless the court otherwise directs<sup>5</sup>. The court may refuse to order the trustee to pay the costs of unsuccessful proceedings by him, if the matter was one proper to be brought before the court<sup>6</sup>.

The trustee may sue or be sued in the official name of 'the trustee of the estate of . . . , a bankrupt'<sup>7</sup>. In the High Court, he should bring any action in the division to which bankruptcy business is for the time being assigned, that is to say, the Chancery Division<sup>8</sup>, unless it is one of a class specially assigned<sup>9</sup> to another division of the High Court<sup>10</sup>.

1 The trustee in bankruptcy of a lessee under a lease which is subject to forfeiture on bankruptcy is liable for mesne profits in proceedings for possession by the lessor, if he identifies himself with the cause of a third party who wrongfully resists the lessor's claim: *Pelican v Moorhouse's Trustee* (1952) 159 Estates Gazette 266.

2 *Re Angerstein, ex p Angerstein* (1874) 9 Ch App 479; *Pitts v La Fontaine* (1880) 6 App Cas 482, PC; *Watson v Holliday* (1883) 52 LJ Ch 543, CA; *Re Mackenzie, ex p Sheriff of Hertfordshire* [1899] 2 QB 566 at 578, CA; *Borneman v Wilson* (1884) 28 ChD 53; *London School Board v Wall Bros* (1891) 7 TLR 566, CA (where the trustee adopted the action, although there was no order making him a party); *Trustee of the Property of Vickery (a bankrupt) v Modern Security Systems Ltd* [1998] 1 BCLC 428, sub nom *Vickery v Modern Security Systems Ltd* [1998] BPIR 164, CA (trustee who adopts action likely to be held personally liable in event of failure for defendant's costs).

3 *Pitts v La Fontaine* (1880) 6 App Cas 482 at 486, PC. As to the effect of failure to obtain the consent of the creditors' committee or the court see para 440 ante. A trustee must not appear on an appeal when his presence is unnecessary: *Re Arden, ex p Arden* (1884) 14 QBD 121, DC. He will not be entitled to indemnity in respect of the costs of a frivolous appeal: *Re Lock, ex p Poppleton* (1891) 8 Morr 51 at 57; *Re Vanderhaege, ex p Viney* [1888] WN 7, CA. Where a trustee shows carelessness in initiating litigation, he will not be entitled to an indemnity: *Re Bryant, ex p Gordon* (1889) 6 Morr 262.

4 *Re Angerstein, ex p Angerstein* (1874) 9 Ch App 479.

5 See the Insolvency Rules 1986, SI 1986/1925, r 7.39 (as substituted); and para 811 post. For instances where the official receiver or the trustee is expressly protected against an order for costs see r 6.105(6) (appeal against decision on proof: see para 537 post), r 6.142(5) (creditor's claim that remuneration is excessive: see para 355 ante), r 6.177(2) (expenses of examination: see para 305 ante), r 6.222 (costs on discharge from bankruptcy: see para 641 post).

See also *Dansk Rekyrliffel Syndikat Akt v Snell* [1908] 2 Ch 127 (where the trustee did not enter an appearance and costs were not given against him personally); *Hill v Cooke-Hill* [1916] WN 61 (where the trustee was ordered to pay the costs 'like any other unsuccessful litigant').

6 *Re Tetley, ex p Jeffrey* (1896) 3 Mans 226 at 236; affd 3 Mans 3121, CA (motion to set aside settlement).

7 See the Insolvency Act 1986 s 305(4); and para 326 ante. On a transmission of office, the old trustee remains liable on the record until the new trustee is substituted in his place: see *Pooley's Trustee v Whetham* (1884) 28 ChD 38 at 52, CA. It seems that a trustee in bankruptcy could validly be a party in his own name (*Leeming v Lady Murray* (1879) 13 ChD 123 at 128), but any indorsement of claim should show any representative capacity (see CPR 16.2(3), (4); and CIVIL PROCEDURE vol 11 (2009) PARA 585).

8 See the Supreme Court Act 1981 s 61(1), Sch 1 para 1(e); and CIVIL PROCEDURE vol 11 (2009) PARA 44.

9 Ie by the Supreme Court Act 1981 s 61 or by the Civil Procedure Rules 1998, SI 1998/3132 (as amended): see CIVIL PROCEDURE vol 11 (2009) PARA 43 et seq.

10 See note 9 supra; and the Insolvency Rules 1986, SI 1986/1925, r 7.15 and para 738 post.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **442 Trustee as litigant**

NOTES 8, 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981:  
Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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#### **443. Trustee's power to compromise.**

With the sanction of the creditors' committee<sup>1</sup> or the court<sup>2</sup>, the trustee in bankruptcy may:

- 604 (1) refer to arbitration, or compromise on such terms as may be agreed on, any debts, claims or liabilities subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt<sup>3</sup>;
- 605 (2) make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any bankruptcy debts<sup>4</sup>;
- 606 (3) make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the bankrupt's estate made or capable of being made on the trustee by any person or by the trustee on any person<sup>5</sup>.

1 As to the creditors' committee see para 328 et seq ante.

2 The court will, in the absence of special circumstances, be unwilling to overrule the views of the creditors' committee or the creditors generally: *Re Ridgway, ex p Hurlbatt* (1889) 6 Morr 277; *Re Ridgway, ex p Clarke* (1891) 8 Morr 289; *Re Pilling, ex p Salaman* [1906] 2 KB 644; and see *Re Geiger* [1915] 1 KB 439 at 450, 451, 456, CA; *Re Salmon, ex p Official Receiver* [1916] 2 KB 510 at 516; cf *Re Bank of Credit and Commerce International SA (No 3)* [1993] BCLC 1490, sub nom *Re Bank of Credit and Commerce International SA (No 2)* [1992] BCC 715, CA.

3 Insolvency Act 1986 s 314(1)(a), Sch 5 para 6. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 314 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 Insolvency Act 1986 Sch 5 para 7.

5 Ibid Sch 5 para 8; and see *Re Ross (a bankrupt)* [1998] 1 BCLC 56, [1998] BCC 29, CA (the bankrupt will be bound by a compromise in the same way as the trustee unless expressly excluded).

#### **UPDATE**

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **444. Arbitration agreements to which bankrupt is party.**

Where a bankrupt becomes party to a contract containing an arbitration agreement<sup>1</sup> before the commencement of his bankruptcy, and the trustee adopts the contract, the arbitration agreement is enforceable by or against the trustee in relation to matters arising from or connected with the contract<sup>2</sup>. If the trustee in bankruptcy does not adopt the contract and a matter to which the arbitration agreement applies needs to be determined in connection with, or for the purposes of, the bankruptcy proceedings, either the trustee with the consent of the creditors' committee, or any other party to the agreement, may apply to the court<sup>3</sup> which may, if it thinks fit, order that the matter be referred to arbitration in accordance with the arbitration agreement<sup>4</sup>.

1 For these purposes, 'arbitration agreement' has the same meaning as in the Arbitration Act 1996 Pt I (ss 1-84) (see ARBITRATION vol 2 (2008) PARA 1213): Insolvency Act 1986 s 349A(4) (added by the Arbitration Act 1996 s 107(1), Sch 3 para 46).

2 Insolvency Act 1986 s 349A(1), (2) (added by the Arbitration Act 1996 Sch 3 para 46). The Insolvency Act 1986 s 349A (as added) was brought into force on 31 January 1997, except in relation to: (1) arbitral proceedings commenced before that date; (2) arbitration applications commenced or made before that date; and (3) arbitration applications commenced or made on or after that date relating to arbitral proceedings commenced before that date: see the Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, arts 3, 4, Sch 2 paras, 1, 2.

3 For these purposes, 'the court' means the court which has jurisdiction in the bankruptcy proceedings: Insolvency Act 1986 s 349A(4) (as added: see note 1 supra). As to the appropriate courts see paras 6, 7 ante.

4 Ibid s 349A(1), (3) (added by the Arbitration Act 1996 Sch 3 para 46). See also note 2 supra.

#### **UPDATE**

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## **(v) After-acquired Property**

### **445. In general.**

The property<sup>1</sup> which vests in the trustee on his appointment taking effect or in the official receiver on his becoming trustee<sup>2</sup> is that property which belongs to the bankrupt at the commencement of the bankruptcy<sup>3</sup>.

Property which is acquired by, or devolves on, the bankrupt after the commencement of the bankruptcy<sup>4</sup> does not automatically vest in the trustee. The trustee may, however, by notice in writing<sup>5</sup> claim for the bankrupt's estate<sup>6</sup> any property which has been so acquired, or has so devolved on, the bankrupt since the commencement of the bankruptcy<sup>7</sup>. Such a notice may not be served in respect of:

- 607 (1) any property<sup>8</sup> not forming part of the bankrupt's estate under the Insolvency Act 1986<sup>9</sup>;
- 608 (2) any property which by virtue of any other enactment<sup>10</sup> is excluded from the bankrupt's estate; or
- 609 (3) without prejudice to an order of the court on an application for discharge<sup>11</sup>, any property which is acquired by, or devolves on, the bankrupt after his discharge<sup>12</sup>.

1 For the meaning of 'property' see para 400 ante; but see also note 8 infra.

2 As to the vesting of the bankrupt's estate in the trustee or the official receiver see para 391 ante.

3 As to the commencement of bankruptcy see para 213 ante.

4 It is important to distinguish between property in respect of which the bankrupt has no interest at the date of the bankruptcy order but which he obtains later and property in respect of which the bankrupt has a future or contingent interest at the date of the bankruptcy order which passes with the estate to the trustee.

5 See para 446 post.

6 For the meaning of 'the bankrupt's estate' see para 216 ante.

7 Insolvency Act 1986 s 307(1). See *Hardy v Pallen* [1997] BCC 815, sub nom *Hardy (a bankrupt) v Buchler* [1997] BPIR 643 (the Insolvency Act 1986 s 307 extends to any commercial transaction carried on by or with the bankrupt and includes money borrowed by the bankrupt in circumstances where he had disclosed his bankruptcy to the lender). As to retrospective validation of after-acquired property seized by the trustee without prior notice to the bankrupt see *Pike (a bankrupt) v Cork Gully* [1997] BPIR 723, CA.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 307 applies, with the modification that in s 307(1) for the words 'commencement of the bankruptcy' there are to be substituted the words 'date of death of the deceased debtor': Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 22. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

The specific provisions of the Insolvency Act 1986 s 307 take priority over the general provisions of the Married Women's Property Act 1882 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 224 et seq): *Rooney v Cardona* [1999] 1 WLR 1388, [1999] BPIR 291, CA. Any sum payable to an eligible student by way of a loan which he receives or is entitled to receive after the commencement of his bankruptcy, whether his entitlement arises before or after that date, is not to be treated as part of his estate for the purpose of the Insolvency Act 1986 ss 307 or 310: see the Education (Student Support) Regulations 2001, SI 2001/951, reg 40(1); and EDUCATION vol 15(2) (2006 Reissue) para 1046.

8 References to property in the Insolvency Act 1986 s 307 do not include any property which, as part of the bankrupt's income, may be the subject of an income payments order under s 310 (as amended) (see para 449 post): s 307(5). See also *Pike v Cork Gully* [1997] BPIR 723, CA; *Supperstone v Lloyd's Names Association Working Party* [1999] BPIR 832; *Krasner v Dennison, Lawrence v Lesser* [2001] Ch 76, [2000] 3 All ER 234, CA.

9 le property falling within the Insolvency Act 1986 s 283(2) or (3): see para 216 heads (a)-(d) ante.

10 See para 216 note 33 ante.

11 le under the Insolvency Act 1986 s 280(2)(c): see para 630 head (3) post.

12 Ibid s 307(2).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **445 In general**

NOTE 7--SI 2001/951 now replaced by the Education (Student Support) Regulations 2009, SI 2009/1555: see further EDUCATION vol 15(2) (2006 Reissue) PARA 1046. See also Assembly Learning Grants and Loans (Higher Education) (Wales) (No 2) Regulations 2008, SI 2008/3170 (amended by SI 2009/470, SI 2009/2156, SI 2009/2737), replaced on 1 September 2010 by Assembly Learning Grants and Loans (Higher Education) (Wales) Regulations 2008, SI 2009/2737: see further EDUCATION vol 15(2) (2006 Reissue) PARA 1046.

TEXT AND NOTES 8-12--Head (4) any property vesting in the bankrupt by virtue of the Insolvency Act 1986 s 283A (see PARA 401): s 307(2)(aa) (added by Enterprise Act 2002 s 261(4)).

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## **446. Trustee's notice of claim.**

Except with the permission of the court<sup>1</sup>, a notice<sup>2</sup> by the trustee in bankruptcy claiming for the bankrupt's estate<sup>3</sup> any property which has been acquired by, or has devolved on, the bankrupt since the commencement of the bankruptcy<sup>4</sup> may not be served after the end of the period of 42 days beginning with the day on which it first came to the knowledge of the trustee that the property in question had been acquired by, or had devolved on, the bankrupt<sup>5</sup>.

On service on the bankrupt of such a notice, the property<sup>6</sup> to which the notice relates vests in the trustee as part of the bankrupt's estate; and the trustee's title to that property has relation back to the time at which the property was acquired by, or devolved on, the bankrupt<sup>7</sup>. Where, whether before or after service of such a notice, a person acquires property in good faith, for value and without notice of the bankruptcy, or a banker enters into a transaction in good faith

and without such notice, the trustee is not in respect of that property or transaction entitled by virtue of these provisions to any remedy against the person or banker, or any person whose title to any property derives from that person or banker<sup>8</sup>.

1 As to the factors to which the court will have regard when considering an application for permission to give notice out of time see *Solomons v Williams* [2001] BPIR 1123.

2 le under the Insolvency Act 1986 s 307(1): see para 445 ante.

3 For the meaning of 'the bankrupt's estate' see para 216 ante.

4 As to the commencement of bankruptcy see para 213 ante.

5 Insolvency Act 1986 s 309(1)(a). For these purposes: (1) anything which comes to the knowledge of the trustee is deemed, in relation to any successor of his as trustee, to have come to the knowledge of the successor at the same time; and (2) anything which comes, otherwise than under head (1) supra, to the knowledge of a person before he is the trustee is deemed to come to his knowledge on his appointment taking effect or, in the case of the official receiver, on his becoming trustee: s 309(2).

As to the application of s 309 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 392 note 5 ante.

6 For the meaning of 'property' for these purposes see para 445 note 8 ante.

7 Insolvency Act 1986 s 307(3). As to the application of s 307 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 445 note 7 ante.

8 Ibid s 307(4).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **447. Bankrupt's duty to give notice to trustee.**

Where, at any time after the commencement of the bankruptcy<sup>1</sup>, any property<sup>2</sup> is acquired by, or devolves on, the bankrupt, the bankrupt must give the trustee notice of the property<sup>3</sup>. Such notice must be given within 21 days of the bankrupt's becoming aware of the relevant facts<sup>4</sup>.

If the bankrupt without reasonable excuse fails to comply with the above obligation, he is guilty of a contempt of court and liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>5</sup>.

1 As to the commencement of bankruptcy see para 213 ante.



2 Subject to the Insolvency Rules 1986, SI 1986/1925, r 6.200(5) (see para 448 post), r 6.200(1) does not apply to property acquired by the bankrupt in the ordinary course of a business carried on by him: r 6.200(4).

3 Insolvency Act 1986 s 333(2). As to the application of s 333 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 345 note 1 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.200(1).

5 Insolvency Act 1986 s 333(4). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq; and as to offences see para 707 et seq post. For the prescribed form of affidavit in support of an application for committal for contempt of court see the Insolvency Rules 1986, SI 1986/1925, rr 12.7(1), (2), Sch 4, Form 7.15 (substituted by SI 1991/495); and for the prescribed form of warrant of committal for contempt see the Insolvency Rules 1986, SI 1986/1925, Sch 4, Form 7.17.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **447 Bankrupt's duty to give notice to trustee**

NOTE 5--SI 1986/1925 Sch 4 Forms 7.15, 7.17 revoked: SI 2010/686.

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### **448. Disposal of property by bankrupt.**

Having served notice in respect of property acquired by or devolving on him<sup>1</sup>, the bankrupt may not, without the trustee's consent in writing, dispose of it within the period of 42 days beginning with the date of the notice<sup>2</sup>. If, however, the bankrupt disposes of property before giving the notice or in contravention of the above provisions, it is his duty forthwith to disclose to the trustee the name and address of the donee, and to provide any other information which may be necessary to enable the trustee to trace the property and recover it for the estate<sup>3</sup>.

If the bankrupt carries on a business, he must, not less often than six-monthly, furnish to the trustee information with respect to it, showing the total of goods bought and sold, or, as the case may be, services supplied, and the profit or loss arising from the business; and the trustee may require the bankrupt to furnish fuller details, including accounts, of the business carried on by him<sup>4</sup>.

Where property has been disposed of by the bankrupt before so giving notice or otherwise in contravention of the above provisions, the trustee may serve notice on the donee, claiming the property as part of the estate<sup>5</sup>; and the trustee's notice must be served within 28 days of his becoming aware of the donee's identity and an address at which he can be served<sup>6</sup>.

Any expenses incurred by the trustee in acquiring title to after-acquired property are payable out of the estate, in the prescribed order of priority<sup>7</sup>.

1 See para 447 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.200(2). Subject to r 6.200(5) (see infra), r 6.200(2), (3) does not apply to property acquired by the bankrupt in the ordinary course of a business carried on by him: r 6.200(4).

3 Ibid r 6.200(3).

4 Ibid r 6.200(5). See *Re a Debtor (No 26 of 1991)* [1996] BCC 246, sub nom *Holmes v Official Receiver* [1996] BPIR 279 (failure to produce accounts of a post-bankruptcy business was held to constitute grounds for suspension of the bankrupt's automatic discharge).

5 le by virtue of the Insolvency Act 1986 s 307(3): see para 446 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 6.201(1), (2).

7 Ibid r 6.202. For the meaning of 'prescribed order of priority' see para 226 note 4 ante.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## **(vi) Income Payments Orders**

### **449. In general.**

On the application of the trustee, the court may make an order ('an income payments order') claiming for the bankrupt's estate<sup>1</sup> so much of the income of the bankrupt<sup>2</sup> during the period for which the order is in force as may be specified in the order<sup>3</sup>. The court may not, however, make an income payments order the effect of which would be to reduce the income of the bankrupt<sup>4</sup> below what appears to the court to be necessary for meeting the reasonable domestic needs<sup>5</sup> of the bankrupt and his family<sup>6</sup>.

An income payments order must, in respect of any payment of income to which it is to apply, either:

610 (1) require the bankrupt to pay to the trustee an amount equal to so much of that payment as is claimed by the order; or

611 (2) require the person making the payment to pay so much of it as is so claimed to the trustee, instead of to the bankrupt<sup>7</sup>.

An income payments order may not be made after the discharge of the bankrupt, and, if made before, does not have effect after his discharge except:

- 612 (a) in the case of a discharge by order of the court<sup>8</sup>, by virtue of a condition imposed<sup>9</sup> by the court; or
- 613 (b) in the case of a discharge after the expiration of the relevant period<sup>10</sup>, by virtue of a provision of the order requiring it to continue in force for a period ending after the discharge but no later than three years after the making of the order<sup>11</sup>.

Sums received by the trustee under an income payments order form part of the bankrupt's estate<sup>12</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 For the purposes of the Insolvency Act 1986 s 310 (as amended), the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office or employment, despite anything in the Welfare Reform and Pensions Act 1999 ss 11 or 12 (see para 395 ante; and SOCIAL SECURITY AND PENSIONS), and any payment under a pension scheme but excluding: (1) any payment by way of guaranteed minimum pension; and (2) payments giving effect to the bankrupt's protected rights as a member of a pension scheme: Insolvency Act 1986 s 310(7) (amended by the Pensions Act 1995 s 122, Sch 3 para 15(b); the Welfare Reform and Pensions Act 1999 s 18, Sch 2 para 2); Insolvency Act 1986 s 310(8) (added by the Pensions Act 1995 Sch 3 para 15(b)). For these purposes, 'guaranteed minimum pension' and 'protected rights' have the same meaning as in the Pension Scheme Act 1993 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) paras 878, 883 respectively): Insolvency Act 1986 s 310(9) (added by the Pensions Act 1995 Sch 3 para 15(b)). Where at the date of the bankruptcy the bankrupt is entitled to income by virtue of some right vested in him, that right together with income received by virtue of that right forms part of the estate and cannot be the subject of an income payments order: *Krasner v Dennison, Lawrence v Lesser* [2001] Ch 76, [2000] 3 All ER 234, CA (entire income accruing to bankrupt from pre-bankruptcy annuity contracts and personal pension schemes; but see now the subsequent legislative change effected by the Welfare Reform and Pensions Act 1999 s 11(2), referred to in para 395 ante); cf *Patel v Jones* [2001] EWCA Civ 779, [2001] BPIR 919.

A one-off payment is capable of constituting income for the purposes of the Insolvency Act 1986 s 310(7) (as amended): *Supperstone v Lloyd's Names Association Working Party* [1999] BPIR 832; *Kilvert v Flackett* [1998] 2 FLR 806, [1998] BPIR 721.

3 Insolvency Act 1986 s 310(1). See also *Kilvert v Flackett* [1998] BPIR 721 (there must be some obvious justification as to why a payment which enhances the bankrupt's income should not be made the subject of an income payments order); *Green v Satsangi* [1998] 1 BCLC 458 (income payments order did not impose tax liability on a trustee in bankruptcy). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 310 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 Ie when taken together with any payments to which the Insolvency Act 1986 s 310(8) (as added) applies: see note 2 supra.

5 Cf *ibid* s 283(2)(b) (see para 216 head (a) ante) where a bankrupt's estate does not comprise (inter alia) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the *basic* domestic needs of the bankrupt and his family. See also *Re Rayatt (a bankrupt)* [1998] 2 FLR 264, [1998] BPIR 495 (private school fees held to constitute a reasonable domestic need).

6 Insolvency Act 1986 s 310(2) (amended by the Pensions Act 1995 Sch 3 para 15(a)). For the meaning of 'family' see para 216 note 8 ante. As to the needs of dependants not living with the bankrupt see *Re X (a bankrupt)* [1996] BPIR 494; and as to the needs of a former wife see *Albert v Albert (a bankrupt)* [1996] BPIR 232, CA.

7 Insolvency Act 1986 s 310(3).

8 Ie under *ibid* s 279(1)(a): see paras 629 head (1), 631 head (1) post.

9 Ie under *ibid* s 280(2)(c): see para 630 head (3) post.

10 le under *ibid* s 279(1)(b): see paras 629 head (2), 631 head (2) post.

11 *Ibid* s 310(6).

12 *Ibid* s 310(5).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **449-455 Income Payments Orders**

The Insolvency Act 1986 s 310A introduces the concept of legally-binding income payments agreements between the bankrupt and the official receiver or the trustee: see further PARA 455A.

### **449 In general**

NOTE 1--An income payments order may be made only on an application instituted by the trustee, and before the discharge of the bankrupt: Insolvency Act 1986 s 310(1A) (added by the Enterprise Act 2002 s 259(3)).

TEXT AND NOTES 8-11--Replaced. An income payments order must specify the period during which it is to have effect; and that period (a) may end after the discharge of the bankrupt, but (b) may not end after the period of three years beginning with the date on which the order is made: 1986 Act s 310(6) (substituted by the 2002 Act s 259(4)). Subject to head (b), an income payments order may be varied on the application of the trustee or the bankrupt, whether before or after discharge: 1986 Act s 310(6A) (added by the 2002 Act s 259(4)).

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### **450. Application for order.**

Where the trustee applies for an income payments order<sup>1</sup>, the court must fix a venue<sup>2</sup> for the hearing of the application<sup>3</sup>. Notice of the application and of the venue must be sent to the bankrupt at least 28 days before the day fixed for the hearing, together with a copy of the trustee's application and a short statement of the grounds on which it is made<sup>4</sup>.

The notice must inform the bankrupt that:

- 614 (1) unless at least seven days before the date fixed for the hearing he sends to the court and to the trustee written consent<sup>5</sup> to an order being made in the terms of the application, he is required to attend the hearing; and

615 (2) if he attends, he will be given an opportunity to show cause why the order should not be made, or an order should be made otherwise than as applied for by the trustee<sup>6</sup>.

1 le under the Insolvency Act 1986 s 310 (as amended): see para 449 ante. As to the mode of application and the procedure see para 764 et seq post.

2 For the meaning of 'venue' see para 84 note 21 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.189(1).

4 Ibid r 6.189(2). For the prescribed form of notice of application see rr 6.189, 12.7(1), (2), Sch 4, Form 6.64.

5 For the prescribed form of written consent see ibid rr 6.189, 12.7(1), (2), Sch 4, Form 6.64.

6 Ibid r 6.189(3).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **449-455 Income Payments Orders**

The Insolvency Act 1986 s 310A introduces the concept of legally-binding income payments agreements between the bankrupt and the official receiver or the trustee: see further PARA 455A.

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### **451. Action to follow making of order.**

Where the court makes an income payments order, a sealed copy of the order must, forthwith after it is made, be sent by the trustee to the bankrupt<sup>1</sup>. If an order to the payer of the relevant income is made<sup>2</sup>, a sealed copy of the order must also be sent by the trustee to the person to whom the order is directed<sup>3</sup>.

Where the court makes an income payments order, it may, if it thinks fit, discharge or vary any attachment of earnings order that is for the time being in force to secure payments by the bankrupt<sup>4</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.190(1). For the prescribed forms of order for income claimed under the Insolvency Act 1986 s 310(3)(a) (see para 449 head (1) ante) and s 310(3)(b) (see para 449 head (2) ante) see the Insolvency Rules 1986, SI 1986/1925, rr 6.190, 12.7(1), (2), Sch 4, Forms 6.65, 6.66 respectively.

2 le under the Insolvency Act 1986 s 310(3)(b): see para 449 head (2) ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.190(2).

4 Insolvency Act 1986 s 310(4). As to the application of s 310 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 449 note 3 ante.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **449-455 Income Payments Orders**

The Insolvency Act 1986 s 310A introduces the concept of legally-binding income payments agreements between the bankrupt and the official receiver or the trustee: see further PARA 455A.

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### **452. Variation of order.**

If an income payments order is made requiring the bankrupt to pay the trustee an amount equal to so much of that payment as is claimed by the trustee<sup>1</sup>, and the bankrupt does not comply with it, the trustee may apply to the court for the order to be varied so as to take effect as an order<sup>2</sup> to the payer of the relevant income<sup>3</sup>. The trustee's application may be made without notice being served on any other party<sup>4</sup>.

Sealed copies of any order made on the application must, forthwith after it is made, be sent by the court to the trustee and the bankrupt<sup>5</sup>.

In the case of an order varying or discharging an income payments order being an order to the payer of the relevant income<sup>6</sup>, an additional sealed copy must be sent to the trustee, for transmission forthwith to the payer of the relevant income<sup>7</sup>.

1 Ie under the Insolvency Act 1986 s 310(3)(a): see para 449 head (1) ante.

2 Ie an order under *ibid* s 310(3)(b): see para 449 head (2) ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.191(1). For the prescribed form of order converting an income payments order made under the Insolvency Act 1986 s 310(3)(a) to an order under s 310(3)(b) see the Insolvency Rules 1986, SI 1986/1925, rr 6.191, 12.7(1), (2), Sch 4, Form 6.67.

4 *Ibid* r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 6.191(2). There is an inherent jurisdiction in the court to set aside orders made on applications made without notice being served on any other party: see *Becker v Noel* [1971] 2 All ER 1248, [1971] 1 WLR 803, CA. Every court having jurisdiction for the purposes of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) may review, rescind or vary any order made by it in the exercise of that jurisdiction: s 375(1). See further para 739 post. As to setting aside orders made on applications made without notice being served on any other party generally see CIVIL PROCEDURE

vol 12 (2009) PARA 1143. As to the possibility of appeal by the Crown as paymaster against an income payments order, despite there being no specific provision for such an appeal, see *Re Duckett, ex p Minister of Education v Trustee* [1964] Ch 398, sub nom *Re Duckett (a bankrupt), ex p Minister of Education v McLeod* [1964] 1 All ER 19, CA.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 375 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 Insolvency Rules 1986, SI 1986/1925, r 6.191(3).

6 See note 2 supra.

7 Insolvency Rules 1986, SI 1986/1925, r 6.191(4).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **449-455 Income Payments Orders**

The Insolvency Act 1986 s 310A introduces the concept of legally-binding income payments agreements between the bankrupt and the official receiver or the trustee: see further PARA 455A.

### **452 Variation of order**

NOTE 4--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

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### **453. Order to payer of income; administration.**

Where a person receives notice of an income payments order being an order to the payer of the relevant income<sup>1</sup>, with reference to income otherwise payable by him to the bankrupt, he must make the arrangements requisite for immediate compliance with the order<sup>2</sup>. When making any payment to the trustee, he may deduct the appropriate fee<sup>3</sup> towards the clerical and administrative costs of compliance with the income payments order; and he must give to the bankrupt a written statement of any amount so deducted by him<sup>4</sup>.

Where a person receives notice of an income payments order imposing on him a requirement to pay so much of the payment as is so claimed to the trustee, instead of to the bankrupt<sup>5</sup>, and either:

- 616 (1) he is then no longer liable to make to the bankrupt any payment of income;  
or  
617 (2) having so made payments in compliance with the order, he ceases to be so  
liable,

he must forthwith give notice of that fact to the trustee<sup>6</sup>.

- 1 le an order under the Insolvency Act 1986 s 310(3)(b): see para 449 head (2) ante.  
2 Insolvency Rules 1986, SI 1986/1925, r 6.192(1). It is apprehended that a payer of income would be entitled to apply to the court to review, rescind or vary its order or to appeal against a decision on such an application under the Insolvency Act 1986 s 375 (as amended): see further para 739 post.  
3 For these purposes, 'the appropriate fee' means 50 pence: Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.11(a).  
4 Ibid r 6.192(2).  
5 See note 1 supra.  
6 Insolvency Rules 1986, SI 1986/1925, r 6.192(3).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **449-455 Income Payments Orders**

The Insolvency Act 1986 s 310A introduces the concept of legally-binding income payments agreements between the bankrupt and the official receiver or the trustee: see further PARA 455A.

### **453 Order to payer of income; administration**

NOTE 3--SI 1986/1925 r 13.11(a) amended: SI 2003/1730.

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### **454. Review of order.**

Where an income payments order is in force, either the trustee or the bankrupt may apply to the court for the order to be varied or discharged<sup>1</sup>.

If the application is made by the trustee, the statutory provisions<sup>2</sup>, with any necessary modifications, apply as in the case of an application for an income payments order<sup>3</sup>. If the



application is made by the bankrupt, it must be accompanied by a short statement of the grounds on which it is made<sup>4</sup>.

If the court thinks that no sufficient cause is shown for the application, it may dismiss the application; but it may not do so unless the applicant has had an opportunity to attend the court for a hearing without notice being served on any other party, of which he has been given at least seven days' notice; and, if the application is not so dismissed, the court must fix a venue<sup>5</sup> for it to be heard<sup>6</sup>.

At least 28 days before the date fixed for the hearing, the applicant must send to the trustee or the bankrupt, whichever of them is not himself the applicant, notice of the venue, accompanied by a copy of the application; and, where the applicant is the bankrupt, the notice must be accompanied by a copy of the statement of the grounds on which it is made<sup>7</sup>.

If the trustee thinks fit, he may appear and be heard on the application; and, whether or not he intends to appear, he may, not less than seven days before the date fixed for the hearing, file a written report of any matters which he considers ought to be drawn to the court's attention<sup>8</sup>. If such a report is filed, a copy of it must be sent by the trustee to the bankrupt<sup>9</sup>.

Sealed copies of any order made on the application must, forthwith after the order is made, be sent by the court to the trustee, the bankrupt and the payer, if other than the bankrupt<sup>9</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.193(1).

2 *Ibid* r 6.189: see para 450 ante.

3 *Ibid* r 6.193(2).

4 *Ibid* r 6.193(3).

5 For the meaning of 'venue' see para 84 note 21 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 6.193(4).

7 *Ibid* r 6.193(5).

8 *Ibid* r 6.193(6).

9 *Ibid* r 6.193(7). For the prescribed form of discharge or variation of order for income claimed under the Insolvency Act 1986 s 310 (as amended) see the Insolvency Rules 1986, SI 1986/1925, rr 6.193, 12.7(1), (2), Sch 4, Form 6.68.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **449-455 Income Payments Orders**

The Insolvency Act 1986 s 310A introduces the concept of legally-binding income payments agreements between the bankrupt and the official receiver or the trustee: see further PARA 455A.

### **454 Review of order**

NOTE 6--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

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#### **455. Bankrupt's duty to give notice to trustee of increase in income.**

Where, at any time after the commencement of the bankruptcy<sup>1</sup>, there is an increase in the bankrupt's income, the bankrupt must give the trustee notice of the increase<sup>2</sup>. Such notice must be given within 21 days of the bankrupt's becoming aware of the relevant facts<sup>3</sup>.

If the bankrupt without reasonable excuse fails to comply with the above obligation, he is guilty of a contempt of court and liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>4</sup>.

1 As to the commencement of bankruptcy see para 213 ante.

2 Insolvency Act 1986 s 333(2). As to the application of s 333 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 345 note 1 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.200(1).

4 Insolvency Act 1986 s 333(4). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq; and as to offences see para 707 et seq post. For the prescribed form of affidavit in support of an application for committal for contempt of court see the Insolvency Rules 1986, SI 1986/1925, rr 12.7(1), (2), Sch 4, Form 7.15 (substituted by SI 1991/495); and for the prescribed form of warrant of committal for contempt see the Insolvency Rules 1986, SI 1986/1925, Sch 4, Form 7.17.

### **UPDATE**

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **449-455 Income Payments Orders**

The Insolvency Act 1986 s 310A introduces the concept of legally-binding income payments agreements between the bankrupt and the official receiver or the trustee: see further PARA 455A.

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ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(vi) Income Payments Orders/455A. Income payments agreement.

**455A. Income payments agreement.**

A provision of an income payments agreement<sup>1</sup> may be enforced as if it were a provision of an income payments order<sup>2</sup>. While an income payments agreement is in force the court may, on the application of the bankrupt, his trustee or the official receiver, discharge or vary an attachment of earnings order that is for the time being in force to secure payments by the bankrupt<sup>3</sup>. An income payments agreement must specify the period during which it is to have effect; and that period (1) may end after the discharge of the bankrupt<sup>4</sup>, but (2) may not end after the period of three years beginning with the date on which the agreement is made<sup>5</sup>. An income payments agreement may, subject to head (2) above, be varied by written agreement between the parties<sup>6</sup>, or by the court on an application made by the bankrupt, the trustee or the official receiver<sup>7</sup>. The court may not vary an income payments agreement so as to include provision of a kind which could not be included in an income payments order<sup>8</sup>, and must grant an application to vary an income payments agreement if and to the extent that the court thinks variation necessary to avoid the reduction of the income of the bankrupt below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family<sup>9</sup>.

1    Ie a written agreement between a bankrupt and his trustee or between a bankrupt and the official receiver which provides (1) that the bankrupt is to pay to the trustee or the official receiver an amount equal to a specified part or proportion of the bankrupt's income for a specified period, or (2) that a third person is to pay to the trustee or the official receiver a specified proportion of money due to the bankrupt by way of income for a specified period: Insolvency Act 1986 s 310A(1) (s 310A added by the Enterprise Act 2002 s 260). As to the approval and acceptance of income payments agreements, see the Insolvency Rules 1986, SI 1986/1925, rr 6.193A, 6.193B (added by SI 2003/1730).

2    1986 Act s 310A(2). As to income payments orders see PARA 449 et seq.

3    Ibid s 310A(3). The provisions of s 310(5) and (7)-(9) (see PARA 449) apply to an income payments agreement as they apply to an income payments order: s 310A(4). As to the variation of income payments agreements, see the Insolvency Rules 1986, SI 1986/1925, r 6.193C (added by SI 2003/1730).

4    1986 Act s 310A(5)(a).

5    Ibid s 310A(5)(b).

6    Ibid s 310A(6)(a).

7    Ibid s 310A(6)(b).

8    Ibid s 310A(7)(a).

9    Ie, the effect mentioned in ibid s 310(2) (see PARA 449 TEXT AND NOTES 4-6): s 310A(7)(b).

**UPDATE**

**390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

**449-455 Income Payments Orders**

The Insolvency Act 1986 s 310A introduces the concept of legally-binding income payments agreements between the bankrupt and the official receiver or the trustee: see further PARA 455A.

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## **(vii) Trustee's Powers and Duties**

### **456. General functions of trustee.**

The function of the trustee<sup>1</sup> is to get in, realise and distribute the bankrupt's estate<sup>2</sup>; and, in the carrying out of that function and in the management of the bankrupt's estate, the trustee is entitled<sup>3</sup> to use his own discretion<sup>4</sup>.

It is the duty of the trustee, if he is not the official receiver:

- 618 (1) to furnish the official receiver with such information;
- 619 (2) to produce to the official receiver, and permit inspection by the official receiver of, such books, papers and other records<sup>5</sup>; and
- 620 (3) to give the official receiver such other assistance, as the official receiver may reasonably require for the purpose of enabling him to carry out his functions<sup>6</sup> in relation to the bankruptcy<sup>7</sup>.

1 le in relation to any bankruptcy where either: (1) the appointment of a person as trustee of a bankrupt's estates takes effect; or (2) the official receiver becomes trustee of a bankrupt's estate.

2 le in accordance with the provisions of the Insolvency Act 1986 ss 305-335 (as amended). For the meaning of 'the bankrupt's estate' see para 216 ante.

3 le subject to ibid ss 305-335 (as amended).

4 Ibid s 305(1), (2). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 305 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 20. However, in any such case, in the exercise of his functions under the Insolvency Act 1986 s 305 where an insolvency administration order has been made, the trustee must have regard to any claim by the personal representative to payment of reasonable funeral, testamentary and administration expenses incurred by him in respect of the deceased debtor's estate or, if there is no such personal representative, to any claim by any other person to payment of any such expenses incurred by him in respect of the estate provided that the trustee has sufficient funds in hand for the purpose, and such claims have priority over the preferential debts listed in s 386, Sch 6 (as amended) (see para 577 et seq post): s 305(5) (added by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 20). As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

As to the modification of the Insolvency Act 1986 s 305 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1284.

5 For the meaning of 'records' see para 21 note 11 ante.

6 As to the official receiver's functions see para 32 ante; and as to the power to contract out the official receiver's functions see para 33 ante..

7 Insolvency Act 1986 s 305(3).

**UPDATE****390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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**457. Acquisition by trustee of control.**

In relation to, and for the purpose of acquiring or retaining possession of, the bankrupt's estate<sup>1</sup>, the trustee is in the same position as if he were a receiver of property appointed by the High Court<sup>2</sup>; and the court may, on his application, enforce such acquisition or retention accordingly<sup>3</sup>.

The trustee must take possession of all books, papers and other records<sup>4</sup> which relate to the bankrupt's estate or affairs<sup>5</sup> and which belong to him or are in his possession or under his control, including any which would be privileged from disclosure in any proceedings<sup>6</sup>. The bankrupt must deliver up to the trustee possession of any property, books, papers or other records of which he has possession or control and of which the trustee is required to take possession<sup>7</sup>.

If any of the following is in possession of any property, books, papers or other records of which the trustee is required to take possession, namely:

- 621 (1) the official receiver;
- 622 (2) a person who has ceased to be trustee of the bankrupt's estate; or
- 623 (3) a person who has been the supervisor of a voluntary arrangement approved in relation to the bankrupt under Part VIII of the Insolvency Act 1986<sup>8</sup>,

the official receiver or, as the case may be, that person must deliver up possession of the property, books, papers or records to the trustee<sup>9</sup>.

Any banker or agent of the bankrupt or any other person who holds any property to the account of, or for, the bankrupt must pay or deliver to the trustee all property in his possession or under his control which forms part of the bankrupt's estate and which he is not by law entitled to retain as against the bankrupt or trustee<sup>10</sup>.

If any person without reasonable excuse fails to comply with any of the above obligations, he is guilty of a contempt of court and liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>11</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 See RECEIVERS vol 39(2) (Reissue) para 301 et seq.

3 Insolvency Act 1986 s 311(2). As to the application of s 311 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 396 note 3 ante.

4 For the meaning of 'records' see para 21 note 11 ante.

5 For the meaning of references to a person's affairs see para 81 note 4 ante.

6 Insolvency Act 1986 s 311(1).

7 Ibid s 312(1). Section 312(1) is without prejudice to the general duties of the bankrupt under s 333 (see para 345 ante): s 312(1). As to the application of s 312 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 396 note 4 ante; and as to the modification of s 312 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 822 post and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1285.

8 le under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.

9 See ibid s 312(2); and para 396 ante.

10 Ibid s 312(3).

11 Ibid s 312(4). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq; and as to offences see para 707 et seq post. For the prescribed form of affidavit in support of an application for committal for contempt of court see the Insolvency Rules 1986, SI 1986/1925, rr 12.7(1), (2), Sch 4, Form 7.15 (substituted by SI 1991/495); and for the prescribed form of warrant of committal for contempt see the Insolvency Rules 1986, SI 1986/1925, Sch 4, Form 7.17.

## UPDATE

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### **457 Acquisition by trustee of control**

NOTE 11--SI 1986/1925 Sch 4 Forms 7.15, 7.17 revoked: SI 2010/686.

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### **458. Trustee's power of sale.**

Without the consent of the creditors' committee or the court, the trustee may sell any part of the property for the time being comprised in the bankrupt's estate, including the goodwill and book debts of any business<sup>1</sup>.

With the consent of the creditors' committee or the court, the trustee may accept as the consideration for the sale of any property comprised in the bankrupt's estate a sum of money payable at a future time subject to such stipulations as to security or otherwise as the creditors' committee or the court thinks fit<sup>2</sup>. The trustee should, however, realise the bankrupt's

estate with all reasonable speed, primarily by selling the property comprised in the estate<sup>3</sup>. The trustee must exercise his own discretion as to the time and mode of sale, and, unless he does not exercise it bona fide, the court will not interfere<sup>4</sup>.

It is not essential, however, that the trustee should realise all the bankrupt's property whatever its nature. With the permission of the creditors' committee, the trustee may divide in its existing form amongst the bankrupt's creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold<sup>5</sup>.

The trustee may, by assignment, sell a right of action<sup>6</sup>; and the trustee may sell to the bankrupt himself<sup>7</sup>.

Where the trustee, not being the official receiver, disposes of any property comprised in the bankrupt's estate to an associate<sup>8</sup> of the bankrupt, he must, if there is for the time being a creditors' committee, give notice to the committee of that exercise of his powers<sup>9</sup>. If in the administration of the estate the trustee enters into any transaction with a person who is an associate of his, the court may, on the application of any person interested, set the transaction aside and order the trustee to compensate the estate for any loss suffered in consequence of it<sup>10</sup>; but this does not apply if either the transaction was entered into with the prior consent of the court or it is shown to the court's satisfaction that the transaction was for value and that it was entered into by the trustee without knowing, or having reason to suppose, that the person concerned was an associate<sup>11</sup>.

On a sale of real property the trustee is bound to make a good title as is any other vendor<sup>12</sup>, although he may contract to sell only such title as the bankrupt has and may enforce the sale if the bankrupt had any title at all<sup>13</sup>. A trustee is under no liability under the covenants of the bankrupt's lease after he has parted with it and is not justified in stipulating that the predecessor should indemnify him against breaches of covenant as this might tend to reduce the value of the lease which is to be sold<sup>14</sup>.

Where any part of the bankrupt's estate consists of stock or shares in a company, shares in a ship or any other property transferable in the books of a company, office or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt<sup>15</sup>.

Where any property consisting of an interest in a dwelling house which is occupied by the bankrupt or by his spouse or former spouse is comprised in the bankrupt's estate and the trustee is, for any reason, unable for the time being to realise that property, the trustee may apply to the court for an order imposing a charge on the property for the benefit of the bankrupt's estate<sup>16</sup>.

1 See the Insolvency Act 1986 s 314(1)(b), Sch 5 para 9; and para 461 head (1) post.

2 See *ibid* s 314(1)(a), Sch 5 para 3; and para 460 head (3) post.

3 *Ex p Goring* (1790) 1 Ves 168; *Re Miller, ex p Miller* (1840) 1 Mont D & De G 39; *Re Dumbell, ex p Hughes, ex p Lyons* (1802) 6 Ves 617; *Re Russell, ex p Montgomery* (1822) 1 Gl & J 338; *Re Atkinson* (1840) 1 Mont D & De G 238.

4 *Re Peters, ex p Lloyd* (1882) 47 LT 64, CA.

5 See the Insolvency Act 1986 s 326(1); and para 591 post. A permission given for the purposes of s 326(1) may not be a general permission but must relate to a particular proposed exercise of the power in question; and a person dealing with the trustee in good faith and for value is not to be concerned to inquire whether any permission so required has been given: see s 326(2); and para 591 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 326 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 *et seq* post.

6 *Seear v Lawson* (1880) 15 ChD 426, CA; *Guy v Churchill* (1888) 40 ChD 481; *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686, CA. See further para 460 post. As to the assignment of a cause of action subject to the right of set-off see *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL.

7 *Kitson v Hardwick* (1872) LR 7 CP 473; *Re France, ex p Tinker* (1874) 9 Ch App 716; *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686, CA. See also para 460 post. Prior to 29 December 1986 (see para 2 ante) there was some doubt whether the legal estate in real property could pass on a sale to the bankrupt before he had his discharge because, as after-acquired property, it would vest in his trustee: see *Re Pascoe* [1944] Ch 219, CA. Such problems cannot now arise under the Insolvency Act 1986 as there is no automatic vesting of after-acquired property in the trustee: see para 445 et seq ante.

8 For the meaning of 'associate' see para 5 ante.

9 Insolvency Act 1986 s 314(6)(a).

10 See the Insolvency Rules 1986, SI 1986/1925, r 6.147(1); and para 348 ante. It would seem that only a person who had a proprietary or pecuniary interest would qualify: see *Re Beesley (a bankrupt)* [1975] 1 All ER 385, [1975] 1 WLR 568, DC.

11 See the Insolvency Rules 1986, SI 1986/1925, r 6.147(2); and para 348 ante.

12 *M'Donald v Hanson* (1806) 12 Ves 277.

13 *Freme v Wright* (1819) 4 Madd 364; but see *Edwards v Wickwar* (1865) LR 1 Eq 68 at 70. As to a condition that the trustee should not be required to show any further title than the vesting of the bankrupt's estate in the trustee see *Borell v Dann* (1843) 2 Hare 440 at 443, 455. If the trustee retains the title deeds or cannot deliver them to the purchaser (see the Law of Property Act 1925 s 45(9); and SALE OF LAND vol 42 (Reissue) para 131), he must give attested copies at the expense of the estate, and, unless he stipulates to the contrary, he must give an acknowledgment of the purchaser's right to the production of the title deeds, limited to the time of his continuance as trustee: *Re Leicester, ex p Stuart* (1815) 2 Rose 215.

14 *Wilkins v Fry* (1816) 1 Mer 244 at 265, 268.

15 See the Insolvency Act 1986 s 311(3); and para 397 ante.

16 See *ibid* s 313(1); and para 401 ante.

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### **459. Trustee as officer of the court; right to apply for directions.**

As an officer of the court the trustee must act as is just and right, and the court will not allow him to take advantage of a mistake. This principle is commonly known as 'the rule in *Ex parte James*'<sup>1</sup>, and the extent of its operation may be defined only by the case law<sup>2</sup>. However, the rule, which at best is exercised as a discretionary power of the court, appears to have been



exercised only in cases where there has been some form of enrichment of the assets of a bankrupt or insolvent company at the expense of a person seeking recoupment<sup>3</sup>.

The trustee of a bankrupt's estate may apply to the court for directions in relation to any particular matter arising under the bankruptcy<sup>4</sup>. The court is not, however, obliged to give him directions<sup>5</sup>; and, where he has obtained a decision, he should not as a rule appeal from it<sup>6</sup>. The trustee is under the general control of the court throughout the period of his administration of the bankrupt's estate<sup>7</sup>.

1 See *Re Condon, ex p James* (1874) as reported in 9 Ch App 609 at 614 per James LJ, who said that the Court of Bankruptcy ought to be as honest as other people.

2 For cases where the rule was applied see *Re Carnac, ex p Simmonds* (1885) 16 QBD 308, CA; *Re Brown, Dixon v Brown* (1886) 32 ChD 597; *Re Tyler, ex p Official Receiver* [1907] 1 KB 865, CA; *Re Craig & Sons, ex p Hinchcliffe* [1916] 2 KB 497; *Re Thellusson, ex p Aaby* [1919] 2 KB 735, CA; cf *Re Wilson, ex p Salaman* [1926] Ch 21. See, however, *Re Hall, ex p Official Receiver* [1907] 1 KB 875, CA (where the mistake arose through ignorance of the working of the bankruptcy laws); *Re Tricks, ex p Charles* (1885) 3 Morr 15 (where the trustee took advantage of a technicality); *Re Wigzell, ex p Hart* [1921] 2 KB 835, CA (which was to some extent met by the Bankruptcy (Amendment) Act 1926 s 4 (repealed)); *Scranton's Trustee v Pearse* [1922] 2 Ch 87, CA; cf *Tapster v Ward* (1909) 101 LT 503, CA; *Re Phillips* [1914] 2 KB 689; *Re Stokes, ex p Mellish* [1919] 2 KB 256. In *Re Gozzett* [1936] 1 All ER 79, CA, the court declined to extend the rule to a case where, there being no mistake, the creditors, who were builders, had failed to take the precaution of securing a charge on the property.

In *Re Clark, ex p Trustee v Texaco Ltd* [1975] 1 All ER 453 at 458, 459, [1975] 1 WLR 559 at 563, 564 Walton J formulated four conditions which should be present for the operation of the rule:

- 70 (1) there must be some form of enrichment of the assets of the bankrupt by the person seeking to have the rule applied;
- 71 (2) except in the most unusual cases, the claimant must not be in a position to submit an ordinary proof of debt;
- 72 (3) the 'honest man' test should apply ie if such a man who would be personally affected by the result would be bound to admit that it would not be fair for him to keep the money, for his claim had no merits, then the rule applies so as to nullify the claim which he would otherwise have;
- 73 (4) where the rule applies, it operates only to the extent necessary to nullify the enrichment of the estate; it does not necessarily restore the claimant to the status quo ante.

See also *Re Byfield, ex p Hill Samuel & Co Ltd v Trustee* [1982] Ch 267, [1982] 1 All ER 249 (where Goulding J held that the principle did not in general apply to cases where the point in question was not intimately linked with some voluntary conduct of the trustee in bankruptcy himself); *Green v Satsangi* [1998] 1 BCLC 458, [1998] BPIR 55. As to the application of the rule to the liquidator of a company see *Re Opera Ltd* [1891] 2 Ch 154 (revsd on other grounds [1891] 3 Ch 260, CA); *Re Regent Finance and Guarantee Corp'n* [1930] WN 84; *Re TH Knitwear (Wholesale) Ltd* [1988] Ch 275, [1988] 1 All ER 860, CA; *Powdrill v Watson* [1994] 2 All ER 513, CA (affd [1995] 2 AC 394, [1995] 2 All ER 65, HL); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 571.

3 *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491 at 512, 513, [1955] 1 All ER 292 at 300, HL per Lord Keith; and see *Re Cushla Ltd* [1979] 3 All ER 415 at 423, [1979] STC 615 at 623.

4 See the Insolvency Act 1986 s 303(2); and para 344 ante. See also *Re Poole, ex p Cocks* (1882) 21 ChD 397, CA (where the trustee was directed to disregard the creditors' directions); *Re Osborne, ex p Marillier* (1896) 3 Mans 238.

5 See *Re Pilling, ex p Salaman* [1906] 2 KB 644; *Re Harrison and Ingram, ex p Whinney* (1905) 54 WR 203; *Re Webb & Sons, ex p Webb & Sons* (1887) 4 Morr 52.

6 If the appeal fails, the trustee may be made personally liable for the costs incurred; his proper course is to obtain the consent of the creditors and a guarantee from them: *Re Malden, Gibson & Co, ex p James* (1886) 3 Morr 185, PC.

7 See the Insolvency Act 1986 s 303 (as amended); and para 344 ante.

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#### **460. Trustee's powers exercisable with sanction.**

The trustee in bankruptcy with the sanction of the creditors' committee<sup>1</sup> or the court<sup>2</sup> has the following powers:

- 624 (1) power to carry on any business of the bankrupt so far as may be necessary for winding it up beneficially and so far as the trustee is able to do so without contravening any requirement imposed by or under any enactment<sup>3</sup>;
- 625 (2) power to bring, institute or defend any action or legal proceedings relating to the property comprised in the bankrupt's estate<sup>4</sup>;
- 626 (3) power to accept as the consideration for the sale of any property comprised in the bankrupt's estate a sum of money payable at a future time subject to such stipulations as to security or otherwise as the creditors' committee or the court thinks fit<sup>5</sup>;
- 627 (4) power to mortgage or pledge any part of the property comprised in the bankrupt's estate for the purpose of raising money for the payment of his debts<sup>6</sup>;
- 628 (5) power, where any right, option or other power forms part of the bankrupt's estate, to make payments or incur liabilities with a view to obtaining, for the benefit of the creditors, any property which is the subject of the right, option or power<sup>7</sup>;
- 629 (6) power to refer to arbitration<sup>8</sup>, or compromise on such terms as may be agreed on, any debts, claims or liabilities subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt<sup>9</sup>;
- 630 (7) power to make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any bankruptcy debts<sup>10</sup>;
- 631 (8) power to make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the bankrupt's estate made or capable of being made on the trustee by any person or by the trustee on any person<sup>11</sup>;
- 632 (9) power to appoint the bankrupt:

.2

- 1. (a) to superintend the management of his estate or any part of it;
- 2. (b) to carry on his business, if any, for the benefit of his creditors; or
- 3. (c) in any other respect to assist in administering the estate in such manner and on such terms as the trustee may direct<sup>12</sup>.

.3

A permission given for the above purposes may not be a general permission but must relate to a particular proposed exercise of the power in question; and a person dealing with the trustee in good faith and for value is not to be concerned to inquire whether any permission so required has been given<sup>13</sup>. Where, however, the trustee has done anything without the requisite permission, the court or the creditors' committee may, for the purpose of enabling him to meet his expenses out of the bankrupt's estate, ratify what the trustee has done; but the committee may not do so unless it is satisfied that the trustee has acted in a case of urgency and has sought its ratification without undue delay<sup>14</sup>.

Where the trustee, not being the official receiver, in exercise of the powers conferred on him disposes of any property comprised in the bankrupt's estate to an associate<sup>15</sup> of the bankrupt, or employs a solicitor, he must, if there is for the time being a creditors' committee, give notice to the committee of that exercise of his powers<sup>16</sup>.

With the permission of the creditors' committee the trustee may divide in its existing form amongst the bankrupt's creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold<sup>17</sup>.

1 As to the creditors' committee see para 328 et seq ante.

2 The alternative of obtaining the court's consent was not available under the Bankruptcy Act 1914 s 56 (repealed). It is presumed that the trustee ought not to apply to the court where a creditors' committee is in place, except in exceptional circumstances.

3 Insolvency Act 1986 s 314(1)(a), Sch 5 para 1. As to the accounts to be kept and records to be maintained where the trustee so carries on business see para 380 et seq ante. The trustee may appoint the bankrupt to carry on the business: see text head (9) infra.

As to the application of s 314 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 443 note 3 ante.

4 Ibid Sch 5 para 2. As to the trustee as litigant see para 442 ante. The trustee may assign his rights to another person, including the bankrupt: *Guy v Churchill* (1888) 40 ChD 481; *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686, CA; *Weddell v JA Pearce and Major (a firm)* [1988] Ch 26, [1987] 3 All ER 624. See also *Seear v Lawson* (1880) 15 ChD 426, CA; *Re Arnold, ex p Official Receiver* (1891) 9 Morr 1. Provided that the terms of the assignment are proper and fair to the creditors, it is not champertous or otherwise objectionable but is a lawful means of realising an asset: *Norglen Ltd (in liquidation) v Reeds Rains Prudential Ltd* [1999] 2 AC 1, [1998] 1 All ER 218, HL (assignment to legally aided bankrupt). Trustees should exercise such power with circumspection: *Re Papaloizou* [1999] BPIR 106. For a case where a sale by a liquidator, under similar powers to those possessed by the trustee, was held to be champertous see *Groveswood Holdings plc v James Capel & Co Ltd* [1995] Ch 80, [1994] 4 All ER 417, but the correctness of this decision was doubted by Robert Walker J in *Re Oasis Merchandising Services Ltd, Ward v Aitken* [1995] 2 BCLC 493, [1995] BCC 911 (affd [1998] Ch 170, [1997] 1 All ER 1009, CA).

It would appear that the statutory rights of recovery conferred on a trustee by the Insolvency Act 1986 do not form part of the property comprised in the bankrupt's estate for these purposes and are not assignable by him: *Re Ayala Holdings Ltd* [1993] BCLC 256; *Re Oasis Merchandising Services Ltd, Ward v Aitken* supra.

The obtaining of the consent of the creditors' committee is for the estate's protection, not for the protection or benefit of third parties: see *Re A Debtor (No 26A of 1975)* [1984] 3 All ER 995, [1985] 1 WLR 6. A defendant to an action by a trustee may not avail himself as an answer to the proceedings of any failure by the trustee to obtain consent: *Re Branson, ex p Trustee* [1914] 2 KB 701.

5 Insolvency Act 1986 Sch 5 para 3.

6 Ibid Sch 5 para 4.

7 Ibid Sch 5 para 5.

8 As to arbitration agreements to which a bankrupt is a party see ibid s 349A (as added); and para 444 ante.

9 Ibid Sch 5 para 6. See *Re Ridgway, ex p Hurlbatt* (1889) 6 Morr 277; *Re Ridgway, ex p Clarke* (1891) 8 Morr 289; *Re P Macfadyen & Co, ex p Vizianagaram Co Ltd* [1908] 1 KB 675 (court sanctioning agreement between

English trustee and official assignee abroad). The court will not as a general rule express any opinion on a proposed compromise, however complicated the matter may be, where the trustee has obtained the creditors' committee's permission: *Re Pilling, ex p Salaman* [1906] 2 KB 644.

10 Insolvency Act 1986 Sch 5 para 7. For the meaning of 'bankruptcy debt' see para 491 post. The bankrupt has no right to question the trustee's exercise of his judgment: *Re A Debtor, ex p Debtor v Dodwell (Trustee)* [1949] Ch 236, [1949] 1 All ER 510; and see para 443 ante.

11 Insolvency Act 1986 Sch 5 para 8.

12 Ibid s 314(2). It is submitted that 'on such terms as the trustee may direct' includes the payment of remuneration to the bankrupt for his costs. Cf the Bankruptcy Act 1914 s 58 (repealed) under which there was express power to make an allowance to the bankrupt.

13 Insolvency Act 1986 s 314(3).

14 Ibid s 314(4); and see para 464 post.

15 For the meaning of 'associate' see para 5 ante.

16 Insolvency Act 1986 s 314(6); and see para 462 post. In the case of a person adjudged bankrupt before 29 December 1986 (see para 2 ante), or adjudged bankrupt on or after that day on a petition presented before that day, the trustee of the bankrupt's estate may employ a solicitor to assist him in the carrying out of his functions without the permission of the committee of inspection; but if he does so employ a solicitor, he must inform the committee of inspection that he has done so: s 437, Sch 11 para 14(1), (6). For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

As to the employment by the trustee of the petitioning creditor's solicitor and the potential conflict of interest which might arise see *Re Schuppan (a bankrupt)* [1997] 1 BCLC 211, sub nom *Re Schuppan, Trustee of Estate of Schuppan v Schuppan* [1997] BPIR 271; *Re Baron Investments (Holdings) Ltd (in liquidation)*, *Halstuk v Venvil* [2000] 1 BCLC 272.

17 Insolvency Act 1986 s 326(1). See further para 458 ante and para 591 post. As to the application of s 326 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 458 note 5 ante.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **460 Trustee's powers exercisable with sanction**

TEXT AND NOTE 12--Head (10) power to bring legal proceedings under the Insolvency Act 1986 s 339 (see PARA 653 et seq), 340 (see PARA 356 et seq) or 423 (see PARA 664 et seq): s 314(1)(a), Sch 5 para 2A (added by the Enterprise Act 2002 s 262).

NOTE 16--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

CREDITORS/(vii) Trustee's Powers and Duties/461. Trustee's powers exercisable without sanction.

**461. Trustee's powers exercisable without sanction.**

The trustee has, without the sanction of either the court or the creditors' committee, the following powers:

- 633 (1) power to sell any part of the property<sup>1</sup> for the time being comprised in the bankrupt's estate<sup>2</sup>, including the goodwill<sup>3</sup> and book debts of any business<sup>4</sup>;
- 634 (2) power to give receipts for any money received by him, being receipts which effectually discharge the person paying the money from all responsibility in respect of its application<sup>5</sup>;
- 635 (3) power to prove, rank, claim and draw a dividend in respect of such debts due to the bankrupt as are comprised in his estate<sup>6</sup>;
- 636 (4) power to exercise in relation to any property comprised in the bankrupt's estate any powers the capacity to exercise which is vested in him<sup>7</sup> under the Insolvency Act 1986<sup>8</sup>;
- 637 (5) power to deal with any property comprised in the estate to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it<sup>9</sup>;
- 638 (6) power, by the giving of the prescribed notice, to disclaim any onerous property notwithstanding that he has taken possession of it, endeavoured to sell it or otherwise exercised his rights of ownership in relation to it<sup>10</sup>;
- 639 (7) power, by notice in writing, to claim for the bankrupt's estate any property which has been acquired by, or has devolved on, the bankrupt since the commencement of the bankruptcy<sup>11</sup>;
- 640 (8) power, on application to the court, to claim for the bankrupt's estate so much of the income of the bankrupt during the period for which the order is in force as may be specified in the order<sup>12</sup>;
- 641 (9) power, by notice in writing, to claim for the bankrupt's estate property or part of property excluded from the bankrupt's estate where it appears to the trustee that the realisable value of the whole or any part of such property exceeds the cost of a reasonable replacement for that property or that part of it<sup>13</sup>;
- 642 (10) power, by notice in writing, to redeem the security of a creditor whose debt is secured<sup>14</sup>.

1 For the meaning of 'property' see para 400 ante.

2 For the meaning of 'the bankrupt's estate' see para 216 ante.

3 See para 424 ante.

4 Insolvency Act 1986 s 314(1)(b), Sch 5 para 9. As to the trustee's power of sale see further para 458 ante.

As to the application of s 314 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 443 note 3 ante.

5 Ibid Sch 5 para 10.

6 Ibid Sch 5 para 11.

7 Ie under ibid Pts VIII-XI (ss 252-385) (as amended).

8 Ibid Sch 5 para 12.

9 Ibid Sch 5 para 13. Since 1 January 1997 it is no longer possible to create any new entailed interests: see REAL PROPERTY vol 39(2) (Reissue) para 119.

- 10 See para 472 et seq post.
- 11 See para 445 et seq ante.
- 12 See para 449 et seq ante.
- 13 See para 392 ante.
- 14 See para 560 et seq post.

## **UPDATE**

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **462. Trustee's ancillary powers.**

For the purpose of, or in connection with, the exercise of any of his powers under the Insolvency Act 1986<sup>1</sup>, the trustee may, by his official name<sup>2</sup>:

- 643 (1) hold property of every description;
- 644 (2) make contracts;
- 645 (3) sue and be sued;
- 646 (4) enter into engagements binding on himself and, in respect of the bankrupt's estate, on his successor in office;
- 647 (5) employ an agent<sup>3</sup>;
- 648 (6) execute any power of attorney, deed or other instrument;

and he may do any other act which is necessary or expedient for the purposes of or in connection with the exercise of those powers<sup>4</sup>.

1 Ie under the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

2 See para 326 ante.

3 Where the trustee employs a solicitor, he must, if there is for the time being a creditors' committee, give notice to the committee of that exercise of his powers: Insolvency Act 1986 s 314(6)(b). See further para 460 ante.

As to the application of s 314 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 443 note 3 ante.

4 Ibid s 314(5), Sch 5 para 14.

## **UPDATE**

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **463. Power to summon meetings of creditors.**

If the trustee thinks fit, he may<sup>1</sup> at any time summon a general meeting of the bankrupt's creditors<sup>2</sup>; and he must summon such a meeting if he is requested to do so by a creditor of the bankrupt and the request is made with the concurrence of not less than one-tenth, in value, of the bankrupt's creditors, including the creditor making the request<sup>3</sup>.

<sup>1</sup> le without prejudice to the generality of the Insolvency Act 1986 s 314(5), Sch 5 para 14: see para 462 ante.

<sup>2</sup> As to creditors' meetings see para 270 et seq ante.

<sup>3</sup> Insolvency Act 1986 s 314(7). Cf s 294(2); and para 267 ante.

As to the application of s 314 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 443 note 3 ante; and as to the modification of s 314(7) by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 820 post and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1239.

#### **UPDATE**

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **464. Extent of consent; ratification of trustee's acts.**

Where<sup>1</sup> the trustee requires the permission of the creditors' committee or the court, a permission so given may not be a general permission but must relate to a particular proposed exercise of the power in question; and a person dealing with the trustee in good faith and for value is not to be concerned to inquire whether any permission required has been given<sup>2</sup>. Strangers to the bankruptcy cannot raise as a defence the absence of permission<sup>3</sup>. Where the trustee has done anything without the requisite permission, the court or the creditors' committee may, for the purpose of enabling him to meet his expenses out of the bankrupt's estate<sup>4</sup>, ratify what the trustee has done; but the committee may not do so unless it is satisfied that the trustee has acted in a case of urgency and has sought its ratification without undue delay<sup>5</sup>.

1 See para 460 ante.

2 See the Insolvency Act 1986 s 314(3); and para 460 ante.

3 *Weddell v Pearce and Major* [1988] Ch 26 at 37 per Scott J; *Lee v Sangster* (1857) 2 CBNS 1; *Re Branson, ex p Trustee* [1914] 2 KB 701; *Clark v Smith* [1940] 1 KB 126; *Re A Debtor (No 26A of 1975)* [1984] 3 All ER 995, [1985] 1 WLR 6.

4 A third party dealing in good faith and for value need not be concerned as to the granting of a permission to the trustee with which he is involved: see *supra*. However, there remains the case where a trustee acts without permission in a transaction with a third party who is not acting bona fide. The transaction would be liable to be set aside under the general law. The creditors would be unlikely to want to ratify such acts but would presumably have the power to do so.

5 Insolvency Act 1986 s 314(4); and see para 460 ante. As to the application of s 314 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 443 note 3 ante.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **465. Adjustment of prior and other transactions.**

Where an individual is adjudged bankrupt, the trustee in bankruptcy may apply to the court under the statutory provisions relating to transactions at an undervalue<sup>1</sup>, preferences<sup>2</sup> and extortionate credit transactions<sup>3</sup>.

1 See the Insolvency Act 1986 s 339; and para 653 et seq post.

2 See *ibid* s 340; and para 656 et seq post.

3 See *ibid* s 343; and para 658 et seq post.



**UPDATE****390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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**466. Exercise of powers outside jurisdiction.**

Nothing in the Insolvency Act 1986 is to be construed as restricting the capacity of the trustee to exercise any of his powers outside England and Wales<sup>1</sup>.

<sup>1</sup> Insolvency Act 1986 s 314(8). As to the application of s 314 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 443 note 3 ante.

**UPDATE****390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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**467. Power to ensure continuation of essential supplies by utilities.**

A trustee has the like rights as the supervisor of a voluntary arrangement, the official receiver, an interim receiver and a trustee under a deed of arrangement for ensuring continued supplies of gas, electricity, water and telecommunication services<sup>1</sup>.

<sup>1</sup> See the Insolvency Act 1986 s 372 (as amended); and para 113 ante.

**UPDATE**

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **468. Redirection of bankrupt's letters etc.**

Where a bankruptcy order has been made, a trustee in bankruptcy has the like power as the official receiver to apply to the court for the redirection of the bankrupt's letters etc<sup>1</sup>.

1 See the Insolvency Act 1986 s 371 (as amended); and para 264 ante.

#### **UPDATE**

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **469. Seizure of bankrupt's property.**

The trustee in bankruptcy has the like power as the official receiver to apply to the court for an order for the seizure of the property comprised in the bankrupt's estate<sup>1</sup>.

1 See the Insolvency Act 1986 s 365; and para 220 ante.

#### **UPDATE**

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **470. Inquiry into bankrupt's dealings and property.**

The trustee in bankruptcy has the like power as the official receiver to apply to the court for an order requiring the bankrupt and certain specified persons to appear before it in connection with any inquiry into the bankrupt's dealings and property<sup>1</sup> and to apply for an order for the production of documents by the inland revenue<sup>2</sup>.

1 See para 307 et seq ante.

2 See para 301 et seq ante.

#### **UPDATE**

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **471. Second bankruptcy.**

Where a bankruptcy order is made against an undischarged bankrupt, the existing trustee<sup>1</sup> must take into his custody or under his control all property and money to which the statutory provisions relating to stay of distribution apply<sup>2</sup>, in so far as he has not already done so as part of his duties as trustee in the earlier bankruptcy<sup>3</sup>. Where any of that property consists of perishable goods, or goods the value of which is likely to diminish if they are not disposed of, the existing trustee has power to sell or otherwise dispose of the goods<sup>4</sup>. The proceeds of any such sale or disposal must be held, under the existing trustee's control, with the other property and money comprised in the bankrupt's estate<sup>5</sup>. The existing trustee must, as and when requested by the trustee for the purposes of the later bankruptcy, deliver up to the latter all such property and money as is in his custody or under his control<sup>6</sup>. Any expenses incurred by the existing trustee in complying with his obligations<sup>7</sup> must be defrayed out of, and are a

charge on, all such property and money<sup>8</sup>, whether in the hands of the existing trustee or of the trustee for the purposes of the later bankruptcy<sup>9</sup>.

Where the existing trustee has been given the prescribed notice<sup>10</sup> of the presentation of the petition for the later bankruptcy, any distribution or other disposition by him of any after-acquired property<sup>11</sup>, any money paid to the existing trustee in pursuance of an income payments order<sup>12</sup> and any property or money which is, or in the hands of the existing trustee represents, the proceeds of sale or application of such property or money, if made after the giving of the notice, is void except to the extent that it was made with the consent of the court or is or was subsequently ratified by the court<sup>13</sup>.

1 For these purposes, 'the existing trustee' means the trustee, if any, of the bankrupt's estate for the purposes of the earlier bankruptcy: Insolvency Act 1986 s 334(1)(c) (applied by the Insolvency Rules 1986, SI 1986/1925, r 6.225(2)). 'The earlier bankruptcy' means the bankruptcy (or, as the case may be, most recent bankruptcy) from which the bankrupt has not been discharged at the commencement of the later bankruptcy: Insolvency Act 1986 s 334(1)(b) (applied by the Insolvency Rules 1986, SI 1986/1925, r 6.225(2)). 'The later bankruptcy' means the bankruptcy arising from the order made against an undischarged bankrupt: Insolvency Act 1986 s 334(1)(a) (applied by the Insolvency Rules 1986, SI 1986/1925, r 6.225(2)).

2 Ie such property and money as is referred to in the Insolvency Act 1986 s 334(3): see para 607 post.

3 Insolvency Rules 1986, SI 1986/1925, rr 6.225(1), 6.226(1).

4 Ibid r 6.226(2).

5 Ibid r 6.226(3).

6 Ibid r 6.227.

7 Ie in compliance with the Insolvency Act 1986 s 335(1) (see para 608 post) and the Insolvency Rules 1986, SI 1986/1925, rr 6.225-6.228.

8 See note 2 supra.

9 Insolvency Rules 1986, SI 1986/1925, r 6.228.

10 For the prescribed form of notice to the existing trustee of the presentation of a petition for a later bankruptcy see ibid r 12.7(1), (2), Sch 4, Form 6.78 (substituted by SI 1987/1919).

11 Ie under the Insolvency Act 1986 s 307(3): see para 446 ante.

12 Ie under ibid s 310 (as amended): see para 449 ante.

13 See ibid s 334(2); and para 607 post. Section 334(2) is without prejudice to s 284 (restrictions on dispositions of property following bankruptcy order: see para 217 ante): s 334(2). As to the adjustment between earlier and later bankrupt estates see s 335; and paras 608, 609 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 334 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 26. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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### **(viii) Disclaimer of Onerous Property**

#### **472. Power to disclaim onerous property.**

By the giving of the prescribed notice<sup>1</sup>, the trustee may disclaim any onerous property<sup>2</sup> and may do so notwithstanding that he has taken possession of it, endeavoured to sell it or otherwise exercised his rights of ownership in relation to it<sup>3</sup>. Such power is exercisable at any time during the trustee's administration of the bankrupt's estate<sup>4</sup>.

1 As to the prescribed notice see para 475 post.

2 For the meaning of 'onerous property' see 473 post.

3 Insolvency Act 1986 s 315(1). As to the application of s 315 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 418 note 6 ante.

4 Under the Bankruptcy Act 1914 s 54(1) (repealed) the trustee's power of disclaimer was exercisable within 12 months after the first appointment of a trustee or such extended period as might be allowed by the court, provided that, where any such property had not come to the knowledge of the trustee within one month after such appointment, he might disclaim such property at any time within 12 months after he had become aware thereof or such extended period as might be allowed by the court. No time limit is, however, specified by the Insolvency Act 1986 for the exercise of the trustee's power of disclaimer.

### **UPDATE**

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **473. Meaning of 'onerous property'.**

For the purposes of disclaimer, onerous property comprises any unprofitable contract and any other property comprised in the bankrupt's estate<sup>1</sup> which is unsaleable or not readily saleable, or is such that it may give rise to a liability to pay money or perform any other onerous act<sup>2</sup>. A notice of disclaimer may not, however, be given<sup>3</sup> in respect of any property that has been claimed as after-acquired property<sup>4</sup> or personal property of the bankrupt exceeding a reasonable replacement value<sup>5</sup>, or certain tenancies<sup>6</sup>, except with the permission of the court<sup>7</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 Insolvency Act 1986 s 315(2). For cases decided under the equivalent provision relating to corporate insolvency in the Insolvency Act 1986 s 178 on the meaning of onerous property see *Re Mineral Resources Ltd (in liquidation)*, *Environment Agency v Stout* [1999] 1 All ER 746, [1999] 2 BCLC 516; *Re Celtic Extraction Ltd (in liquidation)*, *Re Bluestone Chemicals Ltd (in liquidation)* [2001] Ch 475, [1999] 4 All ER 684 (waste management licences); and COMPANIES vol 7(4) (2004 Reissue) para 1337. As to the application of the Insolvency Act 1986 s 315 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 418 note 6 ante.

The wording of s 315 (as amended) differs markedly from its statutory predecessor, the Bankruptcy Act 1914 s 54 (repealed). Nevertheless, while the procedure to be adopted under the Insolvency Act 1986 and the Insolvency Rules 1986, SI 1986/1925 (as amended) (see para 475 et seq post) has been altered, much of the substantive effect of the Bankruptcy Act 1914 (repealed) has been reproduced in the Insolvency Act 1986. Earlier decisions may still be referred to for assistance. An agreement for a lease may be disclaimed: *Re Maughan, ex p Monkhouse* (1885) 14 QBD 956. As to disclaiming the residual liabilities under a lease which has been determined see *Re Throckmorton, ex p Paterson* (1879) 11 ChD 908, CA; *Re Morrish, ex p Hart Dyke* (1882) 22 ChD 410, CA (both decided under the Bankruptcy Act 1869 (repealed), the effect of which, as regards the date when the disclaimer operated, was different from that of the Bankruptcy Act 1914 (repealed) and the Insolvency Act 1986); and *Re ABC Coupler and Engineering Co Ltd (No 3)* [1970] 1 All ER 650, [1970] 1 WLR 702 (company case).

As to Rent Act tenancies see para 485 note 5 post.

Freehold property may be onerous property where it is burdened with onerous covenants: see *Re Mercer and Moore* (1880) 14 ChD 287; *Re Thomas, ex p Woods and Forest Comrs* (1888) 21 QBD 380 at 383, DC. If the trustee disclaims any property, he must disclaim the whole of it, and may not keep part and disclaim part: *Re Fussell, ex p Allen* (1882) 20 ChD 341, CA. He cannot disclaim a contract for the sale of leasehold property unless he disclaims the lease itself: *Re Kerkham, ex p Trustee and Martelli* (1886) 80 LT Jo 322; *Re Bastable, ex p Trustee* [1901] 2 KB 518, CA; *Pearce v Bastable's Trustee in Bankruptcy* [1901] 2 Ch 122 at 125. Where the bankrupt has made a contract to purchase land and also a sub-contract to sell the same land after having erected a building on it, the trustee may disclaim the sub-contract without being obliged to disclaim the contract: *Re Gough, Hanning v Lowe* (1927) 90 LJ Ch 239, DC.

3 Ie under the Insolvency Act 1986 s 315 (as amended): see para 475 post.

4 Ie under ibid s 307: see para 446 ante.

5 Ie under ibid s 308 (as amended): see para 392 ante.

6 Ie under ibid s 308A (as added): see para 393 ante.

7 Ibid s 315(4) (amended by the Housing Act 1988 s 117(4)).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(viii) Disclaimer of Onerous Property/474. Effect of disclaimer.

#### **474. Effect of disclaimer.**

A disclaimer of onerous property<sup>1</sup> operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the bankrupt and his estate<sup>2</sup> in or in respect of the property disclaimed, and discharges the trustee from all personal liability in respect of that property as from the commencement of his trusteeship, but does not, except so far as is necessary for the purpose of releasing the bankrupt, the bankrupt's estate and the trustee from any liability, affect the rights or liabilities of any other person<sup>3</sup>. Thus, a disclaimer by a trustee of a lease which the bankrupt holds by assignment does not affect the liability of the assignor under his covenants to the landlord<sup>4</sup>. The guarantor of the bankrupt's obligations under the lease will, similarly, not be released from further liability to the landlord but he may be entitled to prove in the bankrupt's estate for an indemnity<sup>5</sup>.

1 For the meaning of 'onerous property' see para 473 ante.

2 For the meaning of 'the bankrupt's estate' see para 216 ante.

3 Insolvency Act 1986 s 315(3). As to the application of s 315 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 418 note 6 ante.

4 *Warnford Investments Ltd v Duckworth* [1979] Ch 127, [1978] 2 All ER 517. Where the assignor becomes bankrupt after the bankruptcy of the assignee, his trustee may disclaim the assignor's obligations under the lease, even though the lease may not have become revested in the assignor on the assignee's bankruptcy, the meaning of 'property' in the Insolvency Act 1986 s 436 (see para 400 ante) being sufficiently wide to cover such obligation to the landlord and, further, such obligations arise under an unprofitable contract. As to the surplus realised after payment of a mortgage debt on a disclaimed lease see *Lee v Lee* [1998] 2 BCLC 219, [1999] BCC 268.

5 *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL, overruling *Stacey v Hill* [1901] 1 KB 660; cf *Warnford Investments Ltd v Duckworth* [1979] Ch 127, [1978] 2 All ER 517; *Murphy v Sawyer-Hoare (Stacey and Bowie, third parties)* [1994] 2 BCLC 59 (company cases). See further COMPANIES vol 7(4) (2004 Reissue) para 868.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **475. Trustee's notice of disclaimer.**

Where the trustee disclaims property<sup>1</sup>, the notice of disclaimer must contain such particulars of the property disclaimed as enable it to be easily identified<sup>2</sup>. The notice must be signed by the trustee and filed in court<sup>3</sup>, with a copy; and the court must secure that both the notice and the copy are sealed and indorsed with the date of filing<sup>4</sup>.

The copy notice, so sealed and indorsed, must be returned by the court to the trustee as follows:

- 649 (1) if the notice has been delivered at the offices of the court by the trustee in person, it must be handed to him;  
 650 (2) if it has been delivered by some person acting on the trustee's behalf, it must be handed to that person, for immediate transmission to the trustee; and  
 651 (3) otherwise, it must be sent to the trustee by first-class post<sup>5</sup>.

The court must cause to be indorsed on the original notice, or otherwise recorded on the file, the manner in which the copy notice was returned to the trustee<sup>5</sup>.

The date of the prescribed notice<sup>6</sup> is that which is indorsed on it, and on the copy, in accordance with these provisions<sup>7</sup>.

1 file under the Insolvency Act 1986 s 315 (as amended): see para 472 et seq ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.178(1). For the prescribed form of notice of disclaimer under the Insolvency Act 1986 s 315 (as amended) see the Insolvency Rules 1986, SI 1986/1925, rr 6.178, 12.7(1), (2), Sch 4, Form 6.61 (substituted by SI 1987/1919).

3 For the meaning of 'file in court' see para 95 note 10 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.178(2).

5 Ibid r 6.178(3).

6 file for the purposes of the Insolvency Act 1986 s 315(3): see para 474 ante.

7 Insolvency Rules 1986, SI 1986/1925, r 6.178(4).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **476. Communication of disclaimer to persons interested.**

Within seven days after the day on which the copy of the notice of disclaimer is returned to him by the court, the trustee must send or give copies of the notice, showing the date indorsed by the court<sup>1</sup>, to the following persons<sup>2</sup>:

- 652 (1) where the property disclaimed is of a leasehold nature, he must send or give a copy of the notice to every person who, to his knowledge, claims under the bankrupt as underlessee or mortgagee<sup>3</sup>;



- 653 (2) where the disclaimer is of property in a dwelling house<sup>4</sup>, he must send or give a copy to every person who, to his knowledge, is in occupation of, or claims a right to occupy, the house<sup>5</sup>;
- 654 (3) he must in any case send or give a copy of the notice to every person who, to his knowledge, claims an interest in the disclaimed property, or is under any liability in respect of the property, not being a liability discharged by the disclaimer<sup>6</sup>;
- 655 (4) if the disclaimer is of an unprofitable contract, he must send or give copies of the notice to all such persons as, to his knowledge, are parties to the contract or have interests under it<sup>7</sup>.

If subsequently it comes to the trustee's knowledge, in the case of any person, that he has such an interest in the disclaimed property as would have entitled him to receive a copy of the notice of disclaimer in pursuance of heads (1) to (4) above, the trustee must then forthwith send or give to that person a copy of the notice; but compliance with this provision is not required if the trustee is satisfied that the person has already been made aware of the disclaimer and its date, or the court, on the trustee's application, orders that compliance is not required in that particular case<sup>8</sup>.

The trustee disclaiming property may<sup>9</sup>, at any time, give notice of the disclaimer to any persons who in his opinion ought, in the public interest or otherwise, to be informed of it<sup>10</sup>.

1 le under the Insolvency Rules 1986, SI 1986/1925, r 6.178: see para 475 ante.

2 Ibid r 6.179(1). For the prescribed form of notice of disclaimer and the relevant indorsements by the court and the trustee see rr 6.179, 12.7(1), (2), Sch 4, Form 6.61 (substituted by SI 1987/1919).

3 Insolvency Rules 1986, SI 1986/1925, r 6.179(2).

4 For the meaning of 'dwelling house' see para 401 note 1 ante.

5 Insolvency Rules 1986, SI 1986/1925, r 6.179(3). A notice or copy notice to be served on any person under the age of 18 in relation to the disclaimer of property in a dwelling house is sufficiently served if sent or given to the parent or guardian of that person: r 6.179(7) (added by SI 1987/1919). A child living with his parent is not a person in actual occupation of the property: *Hypo-Mortgage Services Ltd v Robinson* [1997] 2 FCR 422, [1997] 2 FLR 71n, CA.

6 Insolvency Rules 1986, SI 1986/1925, r 6.179(4).

7 Ibid r 6.179(5).

8 Ibid r 6.179(6). As to the mode of application and the procedure see para 764 et seq post.

9 le without prejudice to his obligations under the Insolvency Act 1986 ss 315-319 (as amended) (see paras 472-474 ante and para 478 et seq post) and under the Insolvency Rules 1986, SI 1986/1925, rr 6.178, 6.179 (as amended) (see supra; and para 475 ante).

10 Ibid r 6.180.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **477. Duty to keep court informed.**

The trustee must notify the court from time to time as to the persons to whom he has sent or given copies of the notice of disclaimer<sup>1</sup>, giving their names and addresses, and the nature of their respective interests<sup>2</sup>.

1 le under the Insolvency Rules 1986, SI 1986/1925, r 6.179 (as amended) and r 6.180: see para 476 ante.

2 Ibid r 6.181.

#### **UPDATE**

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **477 Duty to keep court informed**

TEXT AND NOTES--SI 1986/1925 r 6.181 substituted by r 6.181A: SI 2010/686.

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#### **478. Application by trustee for permission to disclaim.**

A notice of disclaimer of onerous property<sup>1</sup> may not be given in respect of any property that has been claimed for the estate as after-acquired property<sup>2</sup> or personal property of the bankrupt exceeding a reasonable replacement value<sup>3</sup>, or certain tenancies<sup>4</sup>, except with the permission of the court<sup>5</sup>. Where the trustee so requires the permission of the court, he may apply for that permission without notice being served on any other party<sup>6</sup>. The application must be accompanied by a report:

- 656 (1) giving such particulars of the property proposed to be disclaimed as enable it to be easily identified;
- 657 (2) setting out the reasons why, the property having been claimed for the estate, the court's permission to disclaim is now applied for; and
- 658 (3) specifying the persons, if any, who have been informed of the trustee's intention to make the application<sup>7</sup>.

If it is stated in the report that any person's consent to the disclaimer has been signified, a copy of that consent must be annexed to the report<sup>8</sup>.

On consideration of the application, the court may grant the permission applied for; and it may, before granting permission, order that notice of the application be given to all such persons who, if the property is disclaimed, will be entitled to apply for a vesting or other order<sup>9</sup> and fix a venue<sup>10</sup> for the hearing of the application<sup>11</sup>.

1 For the meaning of 'onerous property' see para 473 ante.

2 Ie under the Insolvency Act 1986 s 307: see para 446 ante.

3 Ie under ibid s 308 (as amended): see para 392 ante.

4 Ie under ibid s 308A (as added): see para 393 ante.

5 Ibid s 315(4) (amended by the Housing Act 1988 s 117(4)). See further para 473 ante. As to the application of the Insolvency Act 1986 s 315(4) (as so amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 418 note 6 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 6.182(1).

7 Ibid r 6.182(2).

8 Ibid r 6.182(3).

9 Ie under the Insolvency Act 1986 s 320: see para 485 et seq post.

10 For the meaning of 'venue' see para 84 note 21 ante.

11 Insolvency Rules 1986, SI 1986/1925, r 6.182(4).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **478 Application by trustee for permission to disclaim**

NOTE 6--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

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### **479. Interest in property to be declared on request.**

If, in the case of property which the trustee has the right to disclaim, it appears to him that there is some person who claims, or may claim, to have an interest in the property, he may give notice to that person calling on him to declare within 14 days whether he claims any such interest and, if so, the nature and extent of it<sup>1</sup>. Failing compliance with the notice, the trustee is entitled to assume that the person concerned has no such interest in the property as will prevent or impede its disclaimer<sup>2</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.184(1). For the prescribed form of notice of intended disclaimer to an interested party see rr 6.184, 12.7(1), (2), Sch 4, Form 6.63.

2 Ibid r 6.184(2).

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **480. Application requiring the trustee to decide whether or not to disclaim.**

A notice of disclaimer may not be given<sup>1</sup> in respect of any property if a person interested in the property has applied in writing to the trustee or one of his predecessors as trustee requiring the trustee or that predecessor to decide whether he will disclaim or not, and the period of 28 days<sup>2</sup> beginning with the day on which that application was made has expired without a notice of disclaimer having been given in respect of that property<sup>3</sup>. Such application must be delivered to the trustee personally or by registered post, and must be made in the form known as 'notice to elect', or a substantially similar form<sup>4</sup>.

In a case where the property concerned cannot be disclaimed by the trustee without the permission of the court<sup>5</sup>, if, within the period of 28 days mentioned above, the trustee applies to the court for permission to disclaim, the court must extend the time allowed for giving notice of disclaimer to a date not earlier than the date fixed for the hearing of the application<sup>6</sup>.

The trustee is deemed to have adopted any contract<sup>7</sup> which, by virtue of the above provisions<sup>8</sup>, he is not entitled to disclaim<sup>9</sup>.

1 See para 472 et seq ante.

2 Cf the Insolventcy Act 1986 s 178(5) (cited in COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 872) where the period referred to in corporate insolvency is '28 days or such longer period as the court may allow'. Whether the omission of a corresponding provision in relation to individual insolvency was intended to prevent an extension of time seems unlikely, however. Where, by any provision in Pts VIII-XI (ss 252-385) (as amended) or by the Insolventcy Rules 1986, SI 1986/1925 (as amended), the time for doing anything is limited, the court may extend the time, either before or after it has expired, on such terms, if any, as it thinks fit: Insolventcy Act 1986 s 376. It is submitted that the trustee may apply for an extension of time but, as was the

case before 29 December 1986 (see para 2 ante), he will have to show special circumstances, particularly where he applies retrospectively when he must excuse the delay: see *Re Jones, ex p Lovering* (1874) 9 Ch App 586; *Re Richardson, ex p Harris* (1880) 16 ChD 613.

As to the application of the Insolvency Act 1986 s 376 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 157 note 3 ante.

3 Ibid s 316(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 316 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 Insolvency Rules 1986, SI 1986/1925, r 6.183(1), (2). For the prescribed form of notice to elect see rr 6.183, 12.7(1),(2), Sch 4, Form 6.62.

5 See para 478 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 6.183(3).

7 In this context it is possible that 'contract' does not include a lease: see *Re ABC Coupler and Engineering Co Ltd (No 3)* [1970] 1 All ER 650 at 669, [1970] 1 WLR 702 at 722 per Plowman J (a company case interpreting the Companies Act 1948 s 323(4) (repealed), a provision not incorporated in the Insolvency Act 1986). However, the bankrupt's estate in the lease passes to the trustee and, unless the lease is disclaimed by him, the trustee is liable to pay the rent reserved by, and to observe and perform the tenant's covenants contained in, the lease: see para 411 ante.

8 In the Insolvency Act 1986 s 316(1): see *supra*.

9 Ibid s 316(2).

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### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **481. Disclaimer of leaseholds.**

The disclaimer<sup>1</sup> of any property of a leasehold nature does not take effect unless a copy of the disclaimer has been served, so far as the trustee is aware of their addresses, on every person claiming under the bankrupt as underlessee or mortgagee<sup>2</sup> and either:

659 (1) no application is made for a vesting order<sup>3</sup> with respect to that property before the end of the period of 14 days beginning with the day on which the last notice of disclaimer was served; or

660 (2) where such an application has been made, the court directs that the disclaimer is to take effect<sup>4</sup>.

Where the court gives a direction under head (2) above, it may also, instead of or in addition to any order it makes<sup>5</sup>, make such orders with respect to fixtures, tenant's improvements and other matters arising out of the lease as it thinks fit<sup>6</sup>.

1    Ie under the Insolvency Act 1986 s 315 (as amended): see para 472 et seq ante.

2    See para 476 ante.

3    Ie under the Insolvency Act 1986 s 320: see para 485 post.

4    Ibid s 317(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 317 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5    See note 3 supra.

6    Insolvency Act 1986 s 317(2). See further para 484 post.

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### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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## **482. Disclaimer of dwelling house.**

Without prejudice to the statutory provisions as to disclaimer of leaseholds<sup>1</sup>, the disclaimer of a dwelling house<sup>2</sup> does not take effect unless a copy of the disclaimer has been served, so far as the trustee is aware of their addresses, on every person in occupation of or claiming a right to occupy the dwelling house<sup>3</sup> and either:

661 (1)    no application for a vesting order<sup>4</sup> is made with respect to the property before the end of the period of 14 days beginning with the day on which the last notice served under the above provisions was served; or

662 (2)    where such an application has been made, the court directs that the disclaimer is to take effect<sup>5</sup>.

1    Ie the Insolvency Act 1986 s 317: see para 481 ante.

2    For the meaning of 'dwelling house' see para 401 note 1 ante.

3    See para 476 ante.

4    Ie under the Insolvency Act 1986 s 320: see para 485 post.

5 Ibid s 318. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 318 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

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#### **483. Disclaimer of land subject to a rentcharge.**

Where, in consequence of the disclaimer<sup>1</sup> of any land subject to a rentcharge<sup>2</sup>, that land vests by operation of law in the Crown or any other person ('the proprietor'), the proprietor and the proprietor's successors in title are not subject to any personal liability in respect of any sums becoming due under the rentcharge except sums becoming due after the proprietor, or some person claiming under or through the proprietor, has taken possession or control of the land or has entered into occupation of it<sup>3</sup>.

1 Ie under the Insolvency Act 1986 s 315 (as amended): see para 472 et seq ante.

2 As to rentcharges see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) para 751 et seq.

3 Insolvency Act 1986 s 319(1), (2). Section 319 debars the owner of the rentcharge, except as mentioned in the text supra, from suing the Crown or other mesne landlord personally in respect of the rentcharge, but does not affect his rights against the land.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 319 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

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#### **484. Application for vesting order.**

An application by any person for an order of the court to vest or deliver disclaimed property<sup>1</sup> must be made within three months of the applicant becoming aware of the disclaimer, or of his receiving a copy of the trustee's notice of disclaimer<sup>2</sup>, whichever is the earlier<sup>3</sup>.

With his application the applicant must file in court<sup>4</sup> an affidavit<sup>5</sup>:

- 663 (1) stating whether he applies as a person who claims an interest in the disclaimed property<sup>6</sup> or a person who is under a liability in respect of the disclaimed property, not being a liability discharged by the disclaimer<sup>7</sup>, or as a person who, at the time when the bankruptcy petition was presented, was in occupation of or entitled to occupy the dwelling house<sup>8</sup>;
- 664 (2) specifying the date on which he received a copy of the trustee's notice of disclaimer, or otherwise became aware of the disclaimer; and
- 665 (3) specifying the grounds of his application and the order which he desires the court to make<sup>9</sup>.

The court must fix a venue<sup>10</sup> for the hearing of the application; and the applicant must, not later than seven days before the date fixed, give to the trustee notice of the venue, accompanied by copies of the application and the affidavit in support<sup>11</sup>.

On the hearing of the application, the court may give directions as to the other persons, if any, who should be sent or given notice of the application and the grounds on which it is made<sup>12</sup>; and sealed copies of any order made on the application must be sent by the court to the applicant and the trustee<sup>13</sup>.

In a case where the property disclaimed is of a leasehold nature or is property in a dwelling house, and the effect of the disclaimer is suspended<sup>14</sup>, a direction must be included in the court's order giving effect to the disclaimer, unless at the time when the order is issued, other applications for vesting orders are pending in respect of the same property<sup>15</sup>.

1    Ie under the Insolvency Act 1986 s 320: see para 485 post.

2    Ie a notice sent under the Insolvency Rules 1986, SI 1986/1925, r 6.179 (as amended): see para 476 ante.

3    Ibid r 6.186(1), (2).

4    For the meaning of 'file in court' see para 95 note 10 ante.

5    As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

6    Ie under the Insolvency Act 1986 s 320(2)(a): see para 485 head (1) post.

7    Ie under ibid s 320(2)(b): see para 485 head (2) post.

8    Ie under ibid s 320(2)(c): see para 485 head (3) post. For the meaning of 'dwelling house' see para 401 note 1 ante.

9    Insolvency Rules 1986, SI 1986/1925, r 6.186(3).

10   For the meaning of 'venue' see para 84 note 21 ante.



- 11 Insolvency Rules 1986, SI 1986/1925, r 6.186(4).
- 12 Ibid r 6.186(5).
- 13 Ibid r 6.186(6).
- 14 ie under the Insolvency Act 1986 s 317 (see para 481 ante) or s 318 (see para 482 ante).
- 15 Insolvency Rules 1986, SI 1986/1925, r 6.186(7).

## **UPDATE**

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(viii) Disclaimer of Onerous Property/485. Orders vesting disclaimed property; in general.

#### **485. Orders vesting disclaimed property; in general.**

Where the trustee has disclaimed property<sup>1</sup>, then, on application by:

- 666 (1) any person who claims an interest in the disclaimed property<sup>2</sup>; or
- 667 (2) any person who is under any liability in respect of the disclaimed property, not being a liability discharged by the disclaimer; or
- 668 (3) where the disclaimed property is property in a dwelling house, any person who at the time when the bankruptcy petition was presented was in occupation of or entitled to occupy the dwelling house<sup>3</sup>,

the court may make an order on such terms as it thinks fit for the vesting of the disclaimed property in, or for its delivery to:

- 669 (a) a person entitled to it or a trustee<sup>4</sup> for such a person; or
- 670 (b) a person subject to such a liability as is mentioned in head (2) above or a trustee for such a person; or
- 671 (c) where the disclaimed property is property in a dwelling house, any person who at the time when the bankruptcy petition was presented was in occupation of or entitled to occupy the dwelling house<sup>5</sup>.

The court may not, however, make an order in favour of the persons referred to in head (b) above except where it appears to the court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer<sup>6</sup>.

Such an order vesting property in any person need not be completed by any conveyance, assignment or transfer<sup>7</sup>.

1 It is not open to an applicant to seek a vesting order unless and until the trustee has disclaimed the property: *Khan-Ghauri v Dunbar Bank plc* [2001] BPIR 618.

2 Any person interested may apply eg parties claiming under the bankrupt or the lessor (*Re Cock, ex p Shilson* (1887) 20 QBD 343; *Re Finley, ex p Clothworkers' Co* (1888) 21 QBD 475; *Re Britton* (1889) 6 Morr 130; *Re Baker, ex p Lupton* [1901] 2 KB 628, CA), or the lessee who, owing to the bankruptcy of an assignee of the lease, is compelled to pay the rent (*Re Morgan, ex p Morgan* (1889) 22 QBD 592). If there is nothing more than a lease, the disclaimer of the lease determines the lessee's interest in it under the Insolvency Act 1986 s 315(3). He avoids all his liabilities and loses all his rights by virtue of the disclaimer. There is no need of any provision vesting the property in the landlord, for the natural and legal effect of s 315(3) is that the reversion will be accelerated; but, although there is nothing to be vested in the landlord, he may require delivery of possession, and, if so, he can obtain it under s 320(3) (*Re Hyams, ex p Lindsay v Hyams* (1923) 93 LJ Ch 184 at 186, CA); per contra, if any other interest has been created, the lease may be revived (*Re Thompson and Cottrell's Contract* [1943] Ch 97, [1943] 1 All ER 169). See also *Hackney London Borough v Crown Estates Comrs* [1996] BPIR 428; *Lloyds Bank SF Nominees v Aladdin Ltd (in liquidation)* [1996] 1 BCLC 720, CA; *Re Spirit Motorsport Ltd (in liquidation)* [1996] 1 BCLC 684; cf *Re Vedmay Ltd* [1994] 1 BCLC 676.

3 For the meaning of 'dwelling house' see para 401 note 1 ante.

4 See *Re Holmes, ex p Ashworth* [1908] 2 KB 812, DC (where a lessee mortgaged by sub-demise four portions of a plot of land, and an order was made vesting the whole plot, including a portion not mortgaged, in a trustee for the mortgages). See also *Lee v Lee* [1998] 2 BCLC 219, [1999] BCC 268, CA (court's discretion to return surplus proceeds of sale of disclaimed lease vested in a mortgagee to trustee in bankruptcy).

5 Insolvency Act 1986 s 320(1)-(3). As to the position where the property is of a leasehold nature see para 486 post. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 320 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

The Insolvency Act 1986 s 320(3)(c) (see text head (c) supra) will include the bankrupt's spouse in occupation or with a right to occupy under the Family Law Act 1996: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq. It will also include a tenant under a Rent Act protected tenancy. On the bankruptcy of a protected tenant, his contractual interest passes to the trustee in bankruptcy with the rest of his property: see para 411 ante. Where the trustee disclaims, the contractual interest determines and the bankrupt tenant cannot become a statutory tenant of the dwelling house because he was not the protected tenant immediately before the termination of the protected tenancy: see the Rent Act 1977 s 2(1) (as amended); *Reeves v Davies* [1921] 2 KB 486; *Smalley v Quarrier* [1975] 2 All ER 688, [1975] 1 WLR 938; and LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 832. The landlord may, therefore, recover possession of the dwelling house. Where the bankrupt is a statutory tenant, however, his statutory tenancy is personal to him and does not pass to his trustee: see *Sutton v Dorf* [1932] 2 KB 304; and para 411 ante. The bankrupt statutory tenant is entitled to continue to enjoy his personal right to occupy the dwelling house. The bankrupt former protected tenant may apply for a vesting order, possibly in competition with the landlord where the court ought to have regard to general Rent Act principles: see LANDLORD AND TENANT. A further potential applicant under the Insolvency Act 1986 s 320(3)(c) (see text head (c) supra) is the bankrupt himself, particularly where he is entitled to occupy the dwelling house under s 337: see para 650 post.

6 Ibid s 320(4). As to the exercise of the court's discretion to make a vesting order under the analogous provisions of the Companies Act 1985 s 619(5) (repealed) see *Re AE Realisations (1985) Ltd* [1987] 3 All ER 83, [1988] 1 WLR 200; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 876.

7 Insolvency Act 1986 s 320(6). The effect of any order under s 320 must be taken into account in assessing for the purposes of s 315(5) (see para 488 post) the extent of any loss or damage sustained by any person in consequence of the disclaimer: s 320(5).

## UPDATE

### 390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(viii) Disclaimer of Onerous Property/486. Vesting of disclaimed property; leases.

#### **486. Vesting of disclaimed property; leases.**

The court may not make an order<sup>1</sup> vesting property of a leasehold nature in any person, except on terms making that person:

- 672 (1) subject to the same liabilities and obligations as the bankrupt was subject to under the lease on the day the bankruptcy petition was presented; or
- 673 (2) if the court thinks fit, subject to the same liabilities and obligations as that person would be subject to if the lease had been assigned to him on that day<sup>2</sup>.

For the purposes of an order relating to only part of any property comprised in a lease, the above conditions apply as if the lease comprised only the property to which the order relates<sup>3</sup>.

Where the above conditions apply and no person is willing to accept a vesting order on the terms required which satisfy those conditions, the court may, by order, vest the bankrupt's estate or interest in the property in any person who is liable, whether personally or in a representative capacity, and whether alone or jointly with the bankrupt, to perform the lessee's covenants in the lease; and the court may vest that estate and interest in such a person freed and discharged from all estates, incumbrances and interests created by the bankrupt<sup>4</sup>. Where the above conditions apply and a person declines to accept any vesting order, that person is excluded from all interest in the property<sup>5</sup>.

1 le under the Insolvency Act 1986 s 320: see para 485 ante.

2 Ibid s 321(1). Section 321(1) follows the Bankruptcy Act 1914 s 54(6) proviso (b) (repealed): see *Re Walker, ex p Mills* (1895) 64 LJQB 783; *Re Carter and Ellis, ex p Savill Bros* [1905] 1 KB 735 at 742, 755, CA (where an order was made vesting certain leases in mortgagees by sub-demise, subject only to the same liabilities and obligations as if the leases had been assigned to them at the date when the bankruptcy petition was filed; this enabled the mortgagees to rid themselves of their liability by assignment, as well as to limit their liability to breaches of covenant that occurred after the filing of the petition). The court has a discretion, and is not obliged to make the modifications referred to; but, if the exercise of the discretion in favour of the mortgagee will place him in no better position, and the lessor in no worse position, than if there had been no disclaimer, the discretion ought to be exercised in favour of the mortgagee: *Re Carter and Ellis, ex p Savill Bros* supra.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 321 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

3 Insolvency Act 1986 s 321(2).

4 Ibid s 321(3).

5 Ibid s 321(4).

#### **UPDATE**

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(viii) Disclaimer of Onerous Property/487. Registered land.

#### **487. Registered land.**

Where the trustee disclaims a registered lease, and an order is made vesting the lease in some other person, the order must direct the alteration of the register in favour of that person; and, in such case, the land registrar must, on being served with the order, forthwith (without notice to the bankrupt or any person and without requiring production of the land certificate) alter the register accordingly, and no right to indemnity arises by reason of such alteration<sup>1</sup>.

<sup>1</sup> See the Land Registration Act 1925 s 42(2) (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 5(2) (b); the Insolvency Act 1986 s 439(2), Sch 14); and LAND REGISTRATION. As to registered property other than leases see the Land Registration Rules 1925, SR & O 1925/1093, r 184; and LAND REGISTRATION.

#### **UPDATE**

#### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **487 Registered land**

TEXT AND NOTES--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; Land Registration Rules 1925, SR & O 1925/1093 lapsed on the repeal of the enabling authority by the Land Registration Act 2002 s 135, Sch 13, replaced by the Land Registration Rules 2003, SI 2003/1417; see LAND REGISTRATION.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(viii) Disclaimer of Onerous Property/488. Rights of persons injured by disclaimer.

#### **488. Rights of persons injured by disclaimer.**

Any person sustaining loss or damage in consequence of the operation of a disclaimer<sup>1</sup> is deemed to be a creditor of the bankrupt to the extent of the loss or damage and accordingly may prove for the loss or damage as a bankruptcy debt<sup>2</sup>.

1 le under the Insolvency Act 1986 s 315 (as amended): see para 472 et seq ante.

2 Ibid s 315(5). The effect of any vesting order must be taken into account in assessing the extent of any loss or damage sustained by a person in consequence of the disclaimer: see s 320(5); and para 485 note 6 ante. In *Re Hide, ex p Llynvi Coal and Iron Co* (1871) 7 Ch App 28, the measure of damages for the disclaimer of the bankrupt's agreement to take a lease for ten years was held to be the difference between the rent paid under the agreement and the rent obtainable at the time of the disclaimer. On the disclaimer of a lease with a covenant to repair, the measure of the landlord's damages for breach of covenant is limited to the amount, if any, by which the value of the reversion, whether immediate or not, is diminished owing to breach of the covenant: see the Landlord and Tenant Act 1927 s 18(1); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 459.

On a disclaimer of shares, the measure of damages is the amount unpaid on the shares, less the value of any advantages which may accrue from them: *Re Hallett, ex p National Insurance Co* (1894) 1 Mans 380. As to damages on disclaimer of a contract to take up shares see *Re Hooley, ex p United Ordnance and Engineering Co Ltd* [1899] 2 QB 579. See further para 518 post. If a trustee disclaims a contract to purchase land, the vendor is entitled to retain the deposit, even if there is no stipulation as to forfeiture of the deposit: *Re Parnell, ex p Barrell* (1875) 10 Ch App 512.

On a disclaimer of a lease, the normal measure of compensation is for the loss of the right to future rent to be measured by the difference between the rent and other payments which the landlord would have received in future but for the disclaimer and the rent and other sums which the disclaimer will enable him to receive by reletting, such amount to be discounted at an appropriate rate to reflect accelerated receipt of sums which would otherwise only fall due in the future: *Christopher Moran Holdings Ltd v Bairstow* [2000] 2 AC 172, sub nom *Re Park Air Services plc, Christopher Moran Holdings Ltd v Bairstow* [1999] 1 All ER 673, HL.

As to the application of the Insolvency Act 1986 s 315 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 418 note 6 ante.

## UPDATE

### **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(11) ADMINISTRATION OF BANKRUPT'S ESTATE; TRUSTEE'S POWERS; PROPERTY AVAILABLE FOR CREDITORS/(viii) Disclaimer of Onerous Property/489. Disclaimer presumed valid and effective.

### **489. Disclaimer presumed valid and effective.**

Any disclaimer of property by the trustee is presumed valid and effective, unless it is proved that he has been in breach of his duty with respect to the giving of notice of disclaimer, or otherwise under the above provisions<sup>1</sup> relating to disclaimer<sup>2</sup>.

1 le under the Insolvency Act 1986 ss 315-319 (as amended) and the Insolvency Rules 1986, SI 1986/1925, rr 6.178-6.186 (as amended): see para 472 et seq ante.

2 Ibid r 6.185.

## UPDATE

## **390-489 Administration of bankrupt's estate; trustee's powers; property available for creditors**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(i) Debts Provable in Bankruptcy/490. Effect of bankruptcy on creditors' rights.

### **(12) PROOF OF DEBTS**

#### **(i) Debts Provable in Bankruptcy**

##### **490. Effect of bankruptcy on creditors' rights.**

After the making of a bankruptcy order<sup>1</sup> no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy<sup>2</sup>:

- 674 (1) has any remedy against the property or person of the bankrupt in respect of that debt; or
- 675 (2) may, before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the permission of the court and on such terms as the court may impose<sup>3</sup>.

In place of their rights to enforce their claims against the bankrupt and his property, the creditors acquire a right to share proportionally in the distribution<sup>4</sup> by the trustee of the bankrupt's estate of the bankrupt's assets which become vested in the trustee<sup>5</sup>.

All claims which may be proved in the bankruptcy against the bankrupt are called 'provable debts'<sup>6</sup>; a person claiming to be a creditor of the bankrupt who wishes to recover his debt in whole or in part and who submits his claim in writing to the official receiver, where acting as receiver and manager, or to the trustee, is referred to as 'proving for his debt'<sup>7</sup>; and the document by which he seeks to establish his claim is his 'proof' <sup>7</sup>.

1 As to where there has been a previous bankruptcy see para 471 ante and para 607 et seq post.

2 As to provable debts see the Insolvency Rules 1986, SI 1986/1925, r 12.3 (as amended); and para 491 post.

3 See the Insolvency Act 1986 s 285(3); and para 218 ante. Section 285(3) is subject to s 346 (enforcement procedures: see para 678 et seq post) and s 347 (limited right to distress: see para 686 et seq post) (s 285(3)); and s 285(3) does not affect the right of a secured creditor of the bankrupt to enforce his security (s 285(4)). As to secured creditors see para 560 et seq post.

4 As to the distribution of a bankrupt's estate see para 573 et seq post.

5 See para 390 et seq ante; and *Re Higginson and Dean, ex p A-G* [1899] 1 QB 325 at 333, DC.

6 See note 2 supra.

7 See the Insolvency Rules 1986, SI 1986/1925, r 6.96; and para 528 post. The form of proof is known as 'proof of debt': see r 6.96(3); and para 528 post.

## UPDATE

### 490-572 Proof of debts

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(i) Debts Provable in Bankruptcy/491. Provable debts.

#### 491. Provable debts.

The proof of any bankruptcy debt by a secured or unsecured creditor of the bankrupt and the admission or rejection of any proof must take place in accordance with the Insolvency Rules 1986<sup>1</sup>. A bankruptcy debt, in relation to a bankrupt, means any of the following:

- 676 (1) any debt or liability<sup>2</sup> to which he is subject at the commencement of the bankruptcy<sup>3</sup>;
- 677 (2) any debt or liability to which he may become subject after the commencement of the bankruptcy, including after his discharge from bankruptcy<sup>4</sup>, by reason of any obligation incurred before the commencement of the bankruptcy;
- 678 (3) any amount specified in pursuance of the Powers of Criminal Courts Act 1973<sup>5</sup> in any criminal bankruptcy order<sup>6</sup> made against him before the commencement of the bankruptcy; and
- 679 (4) any interest provable<sup>7</sup> under the Insolvency Act 1986<sup>8</sup>.

In determining, for these purposes, whether any liability in tort is a bankruptcy debt, the bankrupt is deemed to become subject to that liability by reason of an obligation incurred at the time when the cause of action accrued<sup>9</sup>.

In bankruptcy, all claims by creditors are provable as debts against the bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages<sup>10</sup>.

However, the following are not provable:

- 680 (a) any fine<sup>11</sup> imposed for an offence, and any obligation arising under an order made in family proceedings<sup>12</sup> or under a maintenance calculation made under the Child Support Act 1991<sup>13</sup>;
- 681 (b) any obligation arising under a confiscation order made under the Drug Trafficking Act 1994<sup>14</sup>, under the Proceeds of Crime (Scotland) Act 1995<sup>15</sup> or under<sup>16</sup> the Criminal Justice Act 1988<sup>17</sup>.

Any claim arising under a restitution order<sup>18</sup> is not provable except at a time when all other claims of creditors in the bankruptcy, other than under a restitution order<sup>18</sup>, have been paid<sup>19</sup> in full with interest<sup>20</sup>.

Nothing in the above provisions prejudices any enactment or rule of law under which a particular kind of debt is not provable, whether on grounds of public policy or otherwise<sup>21</sup>.

1 Insolvency Act 1986 s 322(1). As to secured creditors see para 560 et seq post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 322 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

2 For the purposes of references in the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in Pts VIII-XI (ss 252-385) (as amended) to owing a debt are to be read accordingly: ss 382(3), 385(1). In Pts VIII-XI (ss 252-385) (as amended), except in so far as the context otherwise requires, 'liability' means, subject to s 382(3) (see supra), a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution: s 382(4).

3 As to the commencement of bankruptcy see para 213 ante.

4 As to discharge from bankruptcy see para 629 et seq post.

5 Ie pursuant to the Powers of Criminal Courts Act 1973 s 39(3)(c) (repealed): see para 848 head (3) post. As to the repeal of s 39 see para 844 note 1 post.

6 As to criminal bankruptcy orders see para 844 et seq post.

7 Ie provable as mentioned in the Insolvency Act 1986 s 322(2): see para 545 post.

8 Ibid s 382(1). As to the prospective repeal of s 382(1)(c) (see text head (3) supra) see para 844 note 2 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 382 applies with the modification that in the definition of 'bankruptcy debt' for the words 'commencement of the bankruptcy' wherever they occur there are to be substituted the words 'date of death of the deceased debtor': Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 31.

9 Insolvency Act 1986 s 382(2). Under the Bankruptcy Act 1914 s 30(1) (repealed) demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust were not provable in bankruptcy. However, by virtue of the Insolvency Act 1986 s 382(2), where the cause of action accrued before the commencement of the bankruptcy, the unliquidated claim in tort becomes a bankruptcy debt and the person claiming that he has suffered loss and damage becomes a creditor of the bankrupt. Discharge from bankruptcy does not, however, except to such extent and on such conditions as the court may direct, release the bankrupt from any bankruptcy debt which consists in a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty, or to pay damages by virtue of the Consumer Protection Act 1987 Pt I (ss 1-9 (as amended): see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 518 et seq) being in either case damages in respect of personal injuries to any person: Insolvency Act 1986 s 281(5)(a) (amended by the Consumer Protection Act 1987 s 48(1), Sch 4 para 12). For these purposes, 'personal injuries' includes death and any disease or other impairment of a person's physical or mental condition: Insolvency Act 1986 s 281(8). See further para 643 post.

As to accrual of causes of action see **LIMITATION PERIODS**. The power of the court to award interest on damages in respect of claims in tort, whether under the Supreme Court Act 1981 s 35A (added by the Administration of Justice Act 1982 s 15(1), Sch 1 Pt I) or the County Courts Act 1984 s 69 (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 46; the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (2)), arises only on judgment. The claimant will presumably be able to rely on the Insolvency Rules 1986, SI 1986/1925, r 6.113 (as amended) to claim interest: see para 545 post.

10 Ibid r 12.3(1).

11 For these purposes, 'fine' has the meaning given by the Insolvency Act 1986 s 218(8) (as amended) (see para 643 note 5 post): Insolvency Rules 1986, SI 1986/1925, r 12.3(2) (amended by SI 1993/602).

12 For these purposes, 'family proceedings' has the meaning given by the Insolvency Act 1986 s 218(8) (as amended) (see para 643 note 9 post): Insolvency Rules 1986, SI 1986/1925, r 12.3(2) (amended by SI 1993/602). Discharge from bankruptcy does not, however, except to such extent and on such condition as the court may direct, release the bankrupt from any bankruptcy debt which arises under any order made in family proceedings or under a maintenance calculation made under the Child Support Act 1991: see the Insolvency Act 1986 s 281(5)(b) (as amended); and para 643 head (4)(b) post. An order for costs made in family proceedings is



not a provable debt in bankruptcy: *Levy v Legal Services Commission* [2001] 1 All ER 895, [2001] 1 FCR 178, CA.

13 Ie under the Child Support Act 1991: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) para 553 et seq. In the absence of special circumstances it is not usually appropriate to make a bankruptcy order on a petition presented by a party in respect of a debt arising under a lump sum order in family proceedings: *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA; *Russell v Russell* [1999] 2 FCR 137, [1998] BPIR 259; *Wheatley v Wheatley* [1999] 2 FLR 205, [1999] BPIR 431. As to lump sum orders see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 476 et seq.

14 Ie under the Drug Trafficking Act 1994 s 2.

15 Ie under the Proceeds of Crime (Scotland) Act 1995 ss 1, 8.

16 Ie under the Criminal Justice Act 1988 s 71 (as amended).

17 Insolvency Rules 1986, SI 1986/1925, r 12.3(2) (amended by SI 1987/1919; SI 1989/397; SI 1993/602); Interpretation Act 1978 s 17(2)(b).

18 Ie any claim arising by virtue of the Financial Services and Markets Act 2000 s 382(1)(a), not being a claim also arising by virtue of s 382(1)(b).

19 Ie under the Insolvency Act 1986 s 328(4): see para 585 post.

20 Insolvency Rules 1986, SI 1986/1925, r 12.3(2A) (added by SI 1987/1919; amended by SI 2001/3649).

21 Insolvency Rules 1986, SI 1986/1925, r 12.3(3).

## UPDATE

### 490-572 Proof of debts

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 491-492 Provable debts, Unliquidated damages

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

### 491 Provable debts

NOTE 2--The Insolvency Act 1986 s 382(1) only deals with the debts and liabilities of the debtor, and not those of his personal representatives: *Wicks v Russell* [2008] EWHC 2713 (Ch), [2009] BIPR 194, [2008] All ER (D) 53 (Dec).

NOTE 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 10--SI 1986/1925 r 12.3(1) amended: SI 2003/1730.

NOTES 11, 12, 17--SI 1986/1925 r 12.3(2) amended: SI 2003/1730.

TEXT AND NOTES 11-13--Now head (a) any fine imposed for an offence, and any obligation, other than an obligation to pay a lump sum or to pay costs, arising under an order made in family proceedings or any obligation arising under a maintenance calculation made under the Child Support Act 1991: SI 1986/1925 r 12.3(2) (amended by SI 2005/527).

TEXT AND NOTES 14-16--Head (b). Confiscation orders are now made under the Proceeds of Crime Act 2002 s 6. See **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 390 et seq.

NOTE 20--SI 1986/1925 r 12.3(2) amended: SI 2003/1730.

NOTE 21--Since it may be assumed that a foreign maintenance order providing for periodic payments is variable by the court making the order, it is not a final and conclusive order and so cannot be enforced in England at common law and is not provable by virtue of a rule of law for the purposes of SI 1986/1925 r 12.3(3): *Cartwright v Cartwright* [2002] EWCA Civ 931, [2002] 2 FCR 760.

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## **492. Unliquidated damages.**

A claim for unliquidated damages is a provable debt<sup>1</sup>, whether the liability is one to which the bankrupt is subject at the commencement of the bankruptcy<sup>2</sup> or one to which he may become subject after the commencement of the bankruptcy by reason of any obligation incurred before the commencement of the bankruptcy<sup>3</sup>.

In determining whether any liability in tort is a bankruptcy debt, the bankrupt is deemed to become subject to that liability by reason of an obligation incurred at the time when the cause of action accrued<sup>4</sup>.

1 See the Insolvency Rules 1986, SI 1986/1925, r 12.3(1); and para 491 ante.

2 As to the commencement of bankruptcy see para 213 ante.

3 See the Insolvency Act 1986 s 382(1)(a), (b); and para 491 heads (1), (2) ante.

4 See *ibid* s 382(2); and para 491 ante.

## **UPDATE**

### **490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **491-492 Provable debts, Unliquidated damages**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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#### **493. Contingent debts.**

The trustee must estimate the value of any bankruptcy debt which, by reason of its being subject to any contingency or contingencies or for any other reason, does not bear a certain value<sup>1</sup>.

Where the value of a bankruptcy debt is estimated by the trustee<sup>2</sup> or by the court<sup>3</sup>, the amount provable in the bankruptcy in respect of the debt is the amount of the estimate<sup>4</sup>.

Generally, all contingent liabilities which may end in the payment of money, and which have not been declared incapable of being fairly estimated, are provable<sup>5</sup>. Thus, where the assignee of a lease becomes bankrupt, the lessee or assignor who is liable in respect of the rent and covenants, and whom the bankrupt has covenanted, or is liable, to indemnify, may prove<sup>6</sup>.

1 Insolventy Act 1986 s 322(3); and see para 540 post. A contingent liability is one which, by reason of something done by the person bound, will necessarily arise or come into being, if one or more of certain events occur, or do not occur: *Winter v IRC* [1963] AC 235 at 249, [1961] 3 All ER 855 at 859, HL. As to the application of the Insolvency Act 1986 s 322 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 491 note 1 ante.

2 *Ie* under *ibid* s 322(3): see *supra*.

3 *Ie* under *ibid* s 303: see para 344 ante.

4 *Ibid* s 322(4).

5 *Hardy v Fothergill* (1888) 13 App Cas 351 at 360, 361, HL. For other instances see *Re Allen & Co, ex p Strong and Hanbury* (1893) 10 Morr 84 (breach of covenant to purchase goods for a certain number of years); *Re Gieve, ex p Shaw* (1899) 80 LT 737, CA (value of annuity); *Barnett v King* [1891] 1 Ch 4, CA (liability to pay a sum out of estate after death). A costs order made against a bankrupt after his discharge in proceedings commenced before his bankruptcy is not a contingent debt: *Glenister v Rowe* [2000] Ch 76, [1999] 3 All ER 452, CA. As to annuities see para 503 post; and as to claims by alien enemies see para 526 post.

6 *Hardy v Fothergill* (1888) 13 App Cas 351, HL; *Re Hinks, ex p Verdi* (1886) 3 Morr 218; *Re Carruthers, ex p Tobit* (1895) 2 Mans 172; *Re Perkins, Poyser v Beyfus* [1898] 2 Ch 182, CA. As to the contingent liability of an assignor of a lease to his landlord see *James Smith & Sons (Norwood) Ltd v Goodman* [1936] Ch 216, CA.

### **UPDATE**

#### **490-572 Proof of debts**

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#### **494. Court's power to examine debt.**

A proof may be admitted for dividend either for the whole amount claimed by the creditor, or for part of that amount; but, if the trustee rejects a proof in whole or in part, he must prepare a written statement of his reasons for doing so, and send it forthwith to the creditor<sup>1</sup>.

Every bankruptcy is under the general control of the court and the court has full power<sup>2</sup> to decide all questions of priorities and all other questions, whether of law or fact, arising in any bankruptcy<sup>3</sup>. The court has the right to inquire into the consideration for a debt, including a judgment debt; its power to do so is not confined to examination of the petitioning creditor's debt on which a bankruptcy order is sought to be obtained<sup>4</sup>.

1 See the Insolvency Rules 1986, SI 1986/1925, r 6.104(1), (2); and para 536 post.

2 le subject to the provisions in the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

3 See *ibid* s 363(1); and para 219 ante.

4 *Re Onslow, ex p Kibble* (1875) 10 Ch App 373; *Re Tollemache, ex p Revell* (1884) 13 QBD 720, CA; *Re Tollemache, ex p Edwards* (1884) 14 QBD 415, CA; *Re Tollemache, ex p Bonham* (1885) 14 QBD 604, CA; *Re Tollemache, ex p Anderson* (1885) 14 QBD 606, CA; *Re Lennox, ex p Lennox* (1885) 16 QBD 315, CA; *Re Flatau, ex p Scotch Whisky Distillers Ltd* (1888) 22 QBD 83, CA; *Re Beauchamp, ex p Beauchamp* [1904] 1 KB 572, CA; *Re Van Laun, ex p Pattullo* [1907] 1 KB 155 (affd sub nom *Re Van Laun, ex p Chatterton* [1907] 2 KB 23, CA).

A debt which would have been postponed for purposes of proof under the Insolvency Act 1986 s 329 continues to be so postponed, even after it has been converted into a judgment: *Re Lupkovics, ex p Trustee v Freville* [1954] 2 All ER 125, [1954] 1 WLR 1234.

As to going behind a judgment obtained by a compromise see *Re Blythe, ex p Banner* (1881) 17 ChD 480, CA; *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266, CA; *Re Hawkins, ex p Troup* [1895] 1 QB 404, CA; *Re Mead* [1916] 2 IR 285, CA. As to moneylending cases see para 175 ante and para 527 post.

The court will not go behind an assessment for taxes made against the bankrupt: see *Re Calvert, ex p Calvert* [1899] 2 QB 145; applied in *Re B Moschi, ex p R Moschi v IRC* (1953) 35 TC 92. See further **INCOME TAXATION**.

## UPDATE

### 490-572 Proof of debts

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### 495. Double proof not allowed.

It does not follow that, if there is a provable debt, the right of proof may be insisted on in every case; for it is a well-established principle that there cannot be two proofs in respect of one debt; and this is so, even where there are separate contracts in respect of the same debt<sup>1</sup>.

1 *Re Oriental Commercial Bank, ex p European Bank* (1871) 7 Ch App 99; *Re Hoey, ex p Hoey* (1918) 88 LjKB 273, DC; *Deering v Bank of Ireland* (1886) 12 App Cas 20, HL. The first two cases were cited and applied in *The Liverpool (No 2)* [1963] P 64 at 80, [1960] 3 All ER 307, CA (a salvage case). See also *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] AC 626, [1984] 1 All ER 628, CA; affd [1984] AC 626, [1984] 1 All ER 1060, HL (the court will examine the substance of the transactions which have given rise to the potential application of the rule to

determine who has the better right). As to the application of this rule to proofs by sureties see para 505 et seq post. See also paras 551 note 5, 559 note 6 post.

Under the Bankruptcy Act 1914 s 32, Sch 2 r 19 (repealed), if a debtor was, at the date of the receiving order, liable in respect of distinct contracts (see eg *Re Jeffery, ex p Honey* (1871) 7 Ch App 178 (where there was a joint and several promissory note)) as a member of two or more distinct firms, or as a sole contractor, and also as a member of a firm, proof might be made in respect of the contracts against the properties respectively liable on them, if there were in fact distinct properties (*Re Hooper, Banco de Portugal v Waddell* (1880) 5 App Cas 161, HL; and see *Re Somes, ex p De Lemos* (1896) 3 Mans 131), even though the firms were in whole or in part comprised of the same individuals, or the sole contractor was also one of the joint contractors. The provisions of the Bankruptcy Act 1914 Sch 2 r 19 (repealed), which abolished the former requirement that the creditor had to elect against which estate he would prove, is not re-enacted in the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended). The creditor's election (see *Re Kent County Gas Light & Coke Co Ltd* [1913] 1 Ch 92) was not lost merely because he had proved and received dividend; he could change his election on refunding any dividend received with interest at 4%, but, on changing his election, he could not disturb any dividend already paid (*Re Collie, ex p Adamson* (1878) 8 ChD 807, CA).

The estate of a firm may be liable where all the partners have contracted, although not in the partnership name, and even though the liability contracted is not for partnership purposes: *Re Welch, ex p Stone* (1873) 8 Ch App 914; *Re Laine and Longman, ex p Berner and Neilson* (1886) 56 LQB 153. Where trust money entrusted to a firm for investment has been converted by it, proof may be allowed against the firm's estate on its contract to invest or restore, and against that of one partner, who was trustee, on his contract to perform his trust: *Re Parkers, ex p Sheppard* (1887) 19 QBD 84; *Re Lake, ex p Howe Trustees* [1903] 1 KB 439.

## UPDATE

### 490-572 Proof of debts

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### 496. Foreign creditors.

Ordinarily, a foreign creditor has a right of proof<sup>1</sup>; but, if, in proceedings for the administration of the bankrupt's property abroad, he has received any sum which would be divisible amongst the bankrupt's creditors generally, the sum must be brought into account before he may be allowed to prove in England<sup>2</sup>.

1 Foreign revenue claims are in general not enforceable in an English bankruptcy: see para 498 post.

2 *Re Douglas, ex p Wilson* (1872) 7 Ch App 490; *Re Hooper, Banco de Portugal v Waddell* (1880) 5 App Cas 161, HL. This only applies, however, to what he has obtained by process abroad; if, apart from such process, he is by foreign law a secured creditor, he may value his security and prove for the balance of his debt: *Re Somes, ex p De Lemos* (1896) 3 Mans 131; and see *Re Suidair International Airways Ltd* [1951] Ch 165, [1950] 2 All ER 920; *Cleaver v Delta American Reinsurance Co (in liquidation)* [2001] UKPC 6, [2001] 2 AC 328, [2001] 2 WLR 1202.

As to proof on a contract made abroad, when the remedy is there barred by non-registration, see para 497 text to note 4 post.

## UPDATE

### 490-572 Proof of debts

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#### **497. Illegality or absence of consideration.**

Debts founded on an illegal consideration are not provable<sup>1</sup>; but, where the consideration was in part legal, proof in part has been allowed<sup>2</sup>, and proof was allowed where a genuine debt existed, founded on an independent contract antecedent to such an illegal arrangement<sup>3</sup>.

Proof may be allowed on a contract made abroad, even though, because of some defect, such as want of registration of the contract, no remedy lies on it abroad<sup>4</sup>; and a contract made with one of its members by an unregistered society requiring registration as a company under the Companies Act 1985<sup>5</sup> may give a right to prove where the member has recognised, acquiesced in and ratified the subsequent registration of the company<sup>6</sup>.

1 *Ex p Thompson* (1746) 1 Atk 125; *Re Scott, ex p Bell* (1813) 1 M & S 751; *Re Aldebert & Co, ex p Schmaling* (1817) Buck 93; *Re Grazebrook, ex p Chavasse* (1865) 4 De GJ & Sm 655; and see the cases cited in note 2 infra. As to the effect of the illegality on a contract see further **CONTRACT** vol 9(1) (Reissue) para 839 et seq.

2 *Ex p Mather* (1797) 3 Ves 373; *Ex p Bulmer, Ex p Ellis* (1807) 13 Ves 313. However, as to the effect of the consideration being partly illegal see *Kearney v Whitehaven Colliery Co* [1893] 1 QB 700, CA; and **CONTRACT** vol 9(1) (Reissue) para 877.

3 *Re Guerrier, ex p Leslie* (1882) 20 ChD 131, CA (debt founded on original transaction with a bank for an overdraft, not on the felony of forging bills deposited to secure it; proof allowed).

4 *Re Melbourn, ex p Melbourn* (1870) 6 Ch App 64. See also *Thurburn v Steward* (1871) LR 3 PC 478.

5 See the Companies Act 1985 s 716 (as amended).

6 *Re Thomas, ex p Poppleton* (1884) 14 QBD 379.

#### **UPDATE**

#### **490-572 Proof of debts**

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#### **497 Illegality or absence of consideration**

NOTE 5--1985 Act s 716 repealed: Regulatory Reform (Removal of 20 Member Limit in Partnerships etc.) Order 2002, SI 2002/3203.

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#### **498. Foreign revenue claims.**

Claims to prove in an English bankruptcy for debts due to a foreign State, or an agency of a foreign State, for tax or for debts analogous to taxes, such as social security contributions, are not admissible<sup>1</sup>.

<sup>1</sup> *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491, [1955] 1 All ER 292, HL; cf *Peter Buchanan Ltd and Macharg v McVey* (1951) a decision of the Supreme Court of the Republic of Ireland, reported only at [1955] AC 516n at 530n; *Metal Industries (Salvage) Ltd v ST Harle (Owners)* 1962 SLT 114; *Re Gibbons, ex p Walter* [1960] Ir Jur Rep 60; and see *Brokaw v Seatrain UK Ltd* [1971] 2 QB 476, [1971] 2 All ER 98, CA. See, however, *Re Islington Metal & Plating Works Ltd* [1983] 3 All ER 218, [1984] 1 WLR 14; *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, [1985] 2 All ER 208, HL; *Re State of Norway's Application* [1987] QB 433, [1989] 1 All ER 661, CA. See also *Re Tucker* [1988] Fin LR 323, IoM HC.

#### **UPDATE**

#### **490-572 Proof of debts**

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#### **499. Agreement in fraud of other creditors.**

A right of proof may be affected or lost where the agreement is in effect a fraud on the other creditors<sup>1</sup>. Voluntary bonds entered into in good faith and in such circumstances as not to be a fraud on the creditors generally, are, however, provable *pari passu* with the other debts<sup>2</sup>.

<sup>1</sup> *Re Gomersall* (1875) 1 ChD 137, CA; affd sub nom *Jones v Gordon* (1877) 2 App Cas 616, HL (where bills for £1,727 drawn on the bankrupts by their agent were bought by A, who knew of the bankrupt's embarrassments, from a third party for £200, and A was not allowed to prove for more than £200). See also *Re Bentley, ex p Vere* (1835) 2 Mont & A 123; *Hall v Dyson* (1852) 17 QB 785; *Nerot v Wallace* (1789) 3 Term Rep 17; *Murray v Reeves* (1828) 8 B & C 421; *Kearley v Thomson* (1890) 24 QBD 742, CA; *Re McHenry, McDermott v Boyd, Levita's Claim* [1894] 3 Ch 365, CA (a case relating to annulment by consent under the Bankruptcy Act 1869 (repealed)); *Re Stewart, ex p Pottinger* (1878) 8 ChD 621, CA; *Re Myers, ex p Myers* [1908] 1 KB 941. See further para 512 note 1 post.

<sup>2</sup> *Re Stewart, ex p Pottinger* (1878) 8 ChD 621, CA; *Re Coates, ex p Scott* (1892) 9 Morr 87.

#### **UPDATE**

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## 500. Gaming debts.

A gaming debt is not provable, even though judgment has been obtained in respect of it<sup>1</sup>; and the assignee of such a debt is in no better position than the assignor<sup>2</sup>. The position is not altered even if there is a subsequent agreement between the parties, the consideration for which is an undertaking to abstain from taking some action detrimental to the debtor, such as posting him as a defaulter at his club; if the enforcement of any subsequent agreement would in fact result in the payment in any form of a sum of money alleged to have been won on a wager, it is rendered unenforceable<sup>3</sup>, and, therefore, does not give rise to a provable debt. An account stated based on betting transactions<sup>4</sup>, or a security given for losses on such transactions<sup>5</sup>, is unenforceable.

Proof cannot be made for money lent to the bankrupt to game or bet with<sup>6</sup>, unless the money was lent for gaming purposes in countries where gaming is not illegal<sup>7</sup>. Proof cannot be made for money paid at the bankrupt's request to persons with whom the bankrupt has lost bets<sup>8</sup>, although money lent to the bankrupt to enable him to pay bets which he has lost is provable<sup>9</sup>, provided that it is not a condition of the loan that the borrower must apply it to the payment of a debt or debts incurred by wagering<sup>10</sup>; nor can proof be made for half of a sum of money paid by the claimant to the bankrupt to meet losses on bets made by the bankrupt for him on joint account<sup>11</sup>.

Proof cannot be made for money paid to a stakeholder at the bankrupt's request to abide the result of a wager, on the terms that the money is to be repaid by the bankrupt if he wins, even though he has won<sup>12</sup>; but money deposited with a stakeholder to abide the result of a wager, being recoverable by the depositor before it has been paid over, is provable<sup>13</sup>, and so is money received by an agent for his principal in respect of a wager<sup>14</sup>.

1 *Re Lopes, ex p Hardway and Topping* (1889) 6 Morr 245 (where judgment was obtained on a summons under RSC Ord 14 (revoked), the debtor having failed to comply with the terms on which he obtained conditional permission to defend). In *Re Browne (a bankrupt), ex p Official Receiver v Thompson* [1960] 2 All ER 625, [1960] 1 WLR 692, the trustee sought unsuccessfully to expunge, as a gaming debt, a proof admitted many years previously by a former trustee. See further **LICENSING AND GAMBLING**.

2 *Re Deerhurst, ex p Seaton* (1891) 8 Morr 97, CA.

3 See *Hill v William Hill (Park Lane) Ltd* [1949] AC 530, [1949] 2 All ER 452, HL; *Coral v Kleyman* [1951] 1 All ER 518; and **LICENSING AND GAMBLING**. The decision in *Re Browne, ex p Martingell* [1904] 2 KB 133, where proof was allowed in respect of bills given as the price of the withdrawal of a complaint which had actually been sent to the debtor's club, is now of very doubtful authority: see *Hill v William Hill (Park Lane) Ltd* supra at 563, 566, 574, and at 472, 473, 478.

4 *Alberg v Chandler* (1948) 64 TLR 394, approved in *Law v Dearnley* [1950] 1 KB 400, [1950] 1 All ER 124, CA.

5 *William Hill (Park Lane) Ltd v Hofman* [1950] 1 All ER 1013.

6 *Re Lister, ex p Pyke* (1878) 8 ChD 754, CA.



7 *Saxby v Fulton* [1909] 2 KB 208, CA; *Société Anonyme des Grands Etablissements de Touquet Paris-Plage v Baumgart* (1927) 96 LJB 789. See further **LICENSING AND GAMBLING**.

8 *Tatam v Reeve* [1893] 1 QB 44, DC; *Woolf v Freeman* [1937] 1 All ER 178.

9 *Re Lister, ex p Pyke* (1878) 8 ChD 754, CA. The Gaming Act 1892 s 1 did not alter the law in this respect: *Re O'Shea, ex p Lancaster* [1911] 2 KB 981, CA. See further **LICENSING AND GAMBLING**.

10 *Macdonald v Green* [1951] 1 KB 594, [1950] 2 All ER 1240, CA.

11 *Saffery v Mayer* [1901] 1 KB 11, CA.

12 *Carney v Plimmer* [1897] 1 QB 634, CA.

13 *O'Sullivan v Thomas* [1895] 1 QB 698; *Burge v Ashley and Smith Ltd* [1900] 1 QB 744, CA. See also *Shoolbred v Roberts* [1900] 2 QB 497, CA.

14 *De Mattos v Benjamin* (1894) 63 LJQB 248.

## UPDATE

### 490-572 Proof of debts

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### 501. Costs of legal proceedings.

A claimant's costs in an action to recover a sum which does not give rise to a provable debt are not themselves provable, unless judgment has been entered before the bankruptcy order<sup>1</sup>. If, however, the action is in respect of a claim which is provable, such as one founded on contract, it would seem that, provided that the claimant has obtained judgment prior to the bankruptcy order, or is in a position to enter judgment as of right as a result of the defendant having failed to acknowledge service or serve a defence, or having admitted liability by paying money into court, the claimant's costs are provable<sup>2</sup>.

Where an action brought by a person subsequently adjudged bankrupt is unsuccessful, but neither judgment on the claim nor judgment for costs is given against him until after the bankruptcy order, the defendant's costs are not provable<sup>3</sup>. If, however, in such an action there has been a judgment on the claim or a judgment or an order for costs before the bankruptcy order, the costs would be provable, even though they have not been assessed and judgment has not been entered<sup>4</sup>. A possible liability in respect of the costs of an action, depending on the result of a new trial, is not a provable debt<sup>5</sup>. A claimant who has elected to stay his action before trial or judgment is not entitled to prove for his unassessed costs<sup>6</sup>.

A costs order made against the applicant after his discharge from bankruptcy in respect of costs incurred prior to his bankruptcy does not give rise to a provable debt<sup>7</sup>.

On a reference by consent to arbitration, the costs of the reference are provable, even though not awarded until after the bankruptcy order<sup>8</sup>.

- 1 *Re Newman, ex p Brooke* (1876) 3 ChD 494, CA; *Re Bluck, ex p Bluck* (1887) 57 LT 419; *Re British Gold Fields of West Africa* [1899] 2 Ch 7, CA (from which it would seem that a verdict is sufficient, but this does not appear to be consistent with *Re Newman, ex p Brooke* supra).
- 2 See the principles laid down in *Re Duffield, ex p Peacock* (1873) 8 Ch App 682, and the statement by Lindley MR of the rules as to proof for costs of proceedings taken against a bankrupt in *Re British Gold Fields of West Africa* [1899] 2 Ch 7, CA.
- 3 *Vint v Hudspith* (1885) 30 ChD 24, CA; *Re Bluck, ex p Bluck* (1887) 57 LT 419; *Re British Gold Fields of West Africa* [1899] 2 Ch 7, CA.
- 4 *Re Duffield, ex p Peacock* (1873) 8 Ch App 682; *Re British Gold Fields of West Africa* [1899] 2 Ch 7, CA. As to the estimate of costs for voting purposes see *Re Dummelow, ex p Ruffle* (1873) 8 Ch App 997.
- 5 *Re A Debtor (No 68 of 1911)* [1911] 2 KB 652, CA.
- 6 *Re Pitchford* [1924] 2 Ch 260 (the untaxed costs of the stayed action were not a 'contingent liability' for the purposes of the definition of a provable bankruptcy debt).
- 7 *Glenister v Rowe* [2000] Ch 76, [1999] 3 All ER 452, CA (costs do not fall within the definition of 'contingent debt' within the Insolvency Act 1986 s 382(1)(a) or (b): see para 491 head (1), (2) ante).
- 8 *Re Smith, ex p Edwards* (1886) 3 Morr 179. See also *Re Pickering, ex p Harding* (1854) 5 De GM & G 367.

## UPDATE

### 490-572 Proof of debts

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### 502. Statute-barred debts.

A debt barred by the Limitation Acts<sup>1</sup> is not provable<sup>2</sup>; but a creditor's rights in respect of any lien held by him may be enforceable, even though his debt is barred<sup>3</sup>.

After the bankruptcy order, and during and for the purposes of the bankruptcy proceedings, time ceases to run in respect of provable debts<sup>4</sup>; but, where it has begun to run before the bankruptcy, it continues to run in respect of any rights to pursue any other remedies<sup>5</sup>. It appears that neither the insertion by the bankrupt of a debt in his statement of affairs<sup>6</sup>, nor his answers at his examination<sup>7</sup>, amounts to an acknowledgment sufficient to postpone the running of time for the purpose of proceedings apart from the bankruptcy. Nor can an acknowledgment of liability and a promise to pay the balance be inferred from a payment under a foreign sequestration<sup>8</sup>. A payment of a dividend in bankruptcy will not, it seems, amount to a part payment, so as to prevent the running of time in favour of the debtor<sup>9</sup>.

1 See **LIMITATION PERIODS** vol 68 (2008) PARA 901 et seq.

2 *Ex p Dewdney, ex p Seaman* (1809) 15 Ves 479; *Re Dewdney, ex p Roffey* (1815) 2 Rose 245; *Re Coles, ex p Ross* (1827) 2 Gl & J 330; *Cotterell v Price* [1960] 3 All ER 315, [1960] 1 WLR 1097.

3 *Re Hepburn, ex p Smith* (1884) 14 QBD 394 at 400. See further **LIMITATION PERIODS** vol 68 (2008) PARA 942.

4 *Re Coles, ex p Ross* (1825) 2 Gl & J 46 (on appeal 2 Gl & J 330); *Re Westby, ex p Lancaster Banking Corp* (1879) 10 ChD 776 at 784; *Re Crosley, Munns v Burn* (1887) 35 ChD 266, CA. See also *Re Stock, ex p Amos* (1896) 3 Mans 324 (where after the termination, by reason of the debtor's default, of a composition which had extended over several years, the creditors were held remitted to their rights); *Re Cullwick, ex p London Senior Official Receiver* [1918] 1 KB 646 (right of trustee in prior bankruptcy to prove in subsequent bankruptcy). The court may, however, refuse to admit proof of a debt, if the creditor's delay before proving inhibits a proper inquiry: *Re Tollemache, ex p Revell* (1884) 13 QBD 720, CA, applied in *Re Browne (a bankrupt) ex p Official Receiver v Thompson* [1960] 2 All ER 625, [1960] 1 WLR 692; *Re Tollemache, ex p Edwards* (1884) 14 QBD 415, CA.

5 *Re Benzon, Bower v Chetwynd* [1914] 2 Ch 68 at 75, 76, CA; *Cotterell v Price* [1960] 3 All ER 315, [1960] 1 WLR 1097. Such cases necessarily are most exceptional. See further **LIMITATION PERIODS** vol 68 (2008) PARA 936.

6 *Everett v Robertson* (1858) 1 E & E 16; *Pott v Clegg* (1847) 16 M & W 321; *Courtenay v Williams* (1844) 3 Hare 539; affd 15 LJ Ch 204; approved in *McDonnell v Broderick* [1896] 2 IR 136 at 167; *Re Levey, ex p Topping* (1865) 4 De GJ & Sm 551 (scheduling of debt to deed of arrangement not sufficient to entitle creditor to prove in subsequent bankruptcy).

The decisions in *Everett v Robertson* supra, *Courtenay v Williams* supra and *Re Levey, ex p Topping* supra were on the ground that an acknowledgment in respect of a simple contract debt must import a promise to pay. Under the Limitation Act 1980 ss 29(5), 30, 31(6) an acknowledgment need no longer import a promise to pay. It seems, however, that *Everett v Robertson* supra, and cases decided on similar grounds, will still be good law, since a barred debt is not extinguished and a debtor's statement of affairs is a compulsory document which must contain a list of all his creditors and be submitted to the official receiver: see the Insolvency Act 1986 s 272 (debtor's petition: see para 159 ante) and s 288 (creditor's petition: see para 244 ante). The official receiver is not the agent of the creditor, and it would seem that, apart from any other considerations, the provisions of the Limitation Act 1980 s 30 as to 'acknowledgment' are not satisfied merely by the inclusion of a debt in a statement of affairs.

An admission of a debt in a deceased bankrupt's statement of affairs has been held not to be conclusive evidence of its existence for purposes of proof: *Re Tollemache, ex p Revell* (1884) 13 QBD 720, CA; *Re Tollemache, ex p Edwards* (1884) 14 QBD 415, CA; *Re Browne (a bankrupt), ex p Official Receiver v Thompson* [1960] 2 All ER 625, [1960] 1 WLR 692; cf *Smallcombe v Bruges* (1824) M'Cle 45. See further **LIMITATION PERIODS**.

7 *Taylor v Hollard* [1902] 1 KB 676; *Re Lee, ex p Grunwaldt* [1920] 2 KB 200.

8 *Courtenay v Williams* (1844) 3 Hare 539; affd 15 LJ Ch 204.

9 See *Davies v Edwards* (1851) 7 Exch 22 (dividend in insolvency paid to holder of promissory note held not to have preserved right of action on note); *Re Levey, ex p Topping* (1865) 4 De GJ & Sm 551 (payment of dividend under deed of arrangement held not to have preserved right of proof in subsequent bankruptcy); *Taylor v Hollard* [1902] 1 KB 676 (action on English judgment; right of action held not to have been preserved by payment to plaintiff by foreign sequestrators of defendant's estate in respect of foreign judgment on same matter). These cases were, however, decided on the principle that a promise to pay the remainder must be imported if the part payment were to be effective; under the present statute such a promise need not be imported: see the Limitation Act 1980 ss 29(5), 30, 31(6); and the cases cited in note 6 supra.

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## 503. Annuities.

An annuity is a contingent liability<sup>1</sup>, the value of which may be estimated for proof. Thus, an estimate may be made of the value of an annuity defeasible on a woman's marrying again<sup>2</sup>, or on a resumption of cohabitation by husband and wife, or on dissolution of marriage by any future act of either, or on the wife leading an unchaste life<sup>3</sup>. The following annuities have also been held to be capable of valuation and provable: an annuity to a wife in lieu of repayment by her husband of money lent by her for his business<sup>4</sup>; an annuity to a retiring partner, determinable on breach of covenant not to trade within a limited area<sup>5</sup>; an annuity payable during the continuance of certain works which might cease at any time<sup>6</sup>; and an annuity payable until the annuitant should do some act whereby the annuity, if belonging to him absolutely, would have become vested in another<sup>7</sup>.

In estimating the value, all proper contingencies should be taken into account. Thus, a valuation which did not take into account a clause in a separation deed between husband and wife whereby the annuity should cease if cohabitation should be resumed, and a covenant indemnifying the husband against the wife's debts, would be incorrect<sup>8</sup>. However, a clause making an annuity cease on the resumption of cohabitation between two persons not husband and wife would be void, and could be disregarded in making the estimate<sup>9</sup>.

If the annuitant should die after the receipt of a dividend, and the dividend is greater than the amount which the bankrupt would have had to pay had he remained solvent, the proof or dividend cannot be disturbed<sup>10</sup>.

Where the annuitant dies before the proof has been dealt with, the value of the annuity will be taken to be the amount of the payments falling due up to the date of the death<sup>11</sup>.

If arrears of the annuity are included in the assessment, and others besides the existing annuitant may become interested under the trusts of the annuity, the dividend must be apportioned by the trustees of the annuity, the portion representing arrears paid to the annuitant, and the balance invested in the purchase of a new annuity<sup>12</sup>.

1 As to liability see *Greeves v Tofield* (1880) 14 ChD 563, CA (unregistered annuity charged on land valid against trustee in bankruptcy). See also the Insolvency Act 1986 s 382(3); and para 491 ante.

2 *Re Blakemore, ex p Blakemore* (1877) 5 ChD 372, CA. As to the valuation of a tax-free annuity secured by the covenant of a deceased person see *Re Viscount Rothermere, Mellors, Basden & Co v Coutts & Co* [1945] Ch 72, [1944] 2 All ER 593 (value equal to sum required to purchase consols sufficient, by dividend and capital, to provide the gross annuity (as varied by statute) for normal expectation of life). As to annuities generally see **RENTCHARGES AND ANNUITIES** vol 39(2) (Reissue) para 751 et seq.

3 *Re Batey, ex p Neal* (1880) 14 ChD 579, CA; *Victor v Victor* [1912] 1 KB 247, CA; *McQuiban v McQuiban* [1913] P 208. Although after bankruptcy a wife cannot in these circumstances maintain an action on the covenant for the annuity (*Victor v Victor* supra; *McQuiban v McQuiban* supra), she was held not to be disabled from obtaining an order for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts 1895 to 1949 (repealed) (*Dewe v Dewe, Snowden v Snowden* [1928] P 113). See now the Domestic Proceedings and Magistrates' Courts Act 1978; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 553 et seq.

4 *Re Slade, Crewkerne United Breweries Ltd v Slade* [1921] 1 Ch 160.

5 *Re Jackson, ex p Jackson* (1872) 27 LT 696.

6 *Re Borron, ex p Parratt* (1836) 1 Deac 696.

7 *Re Sinclair, Allen v Sinclair, Hodgkins v Sinclair* [1897] 1 Ch 921.

8 *Re Grieves, ex p Pearce* (1879) 13 ChD 262 at 265, CA.

9 *Re Wood, ex p Naden* (1874) 9 Ch App 670; and see *Re Abdy, Rabbeth v Donaldson* [1895] 1 Ch 455, CA.

10 *Re Pannell, ex p Bates* (1879) 11 ChD 914, CA. Cf *Re Miller, ex p Wardley* (1877) 6 ChD 790 (where the bankrupt died before any dividend was paid).

11 *Re Dodds, ex p Vaughan's Executors* (1890) 25 QBD 529. See also *Re Bridges, Hill v Bridges* (1881) 17 ChD 342; *Re Northern Counties of England Fire Insurance Co, MacFarlane's Claim* (1880) 17 ChD 337.

12 *Re Beecham's Settlement, Johnson v Beecham* [1934] Ch 183.

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#### 504. Guarantees.

When a guarantee limits a surety's liability to a fixed sum, the surety may be liable either to pay a limited sum towards the ultimate balance remaining due after all money obtainable from other sources has been applied in reducing the debt of the principal debtor or as surety for a part of the debt only<sup>1</sup>. In the former case the creditor has the right to prove against the debtor's estate for the whole of his debt until he has received 100 pence in the pound, notwithstanding that he has received some payment from the surety; and the surety has not, by reason of that payment, any right of proof in preference or priority to the creditor<sup>2</sup>. If, however, in such a case, the surety pays the whole debt, or if, being surety for a part of it only, he pays that part, then, as regards the amount so paid, he is subrogated to the rights of the creditor<sup>3</sup>.

The creditor is not entitled to the benefit of a security obtained by the surety from the debtor, and so need have no regard to it in his proof<sup>4</sup>.

1 *Gray v Seckham* (1872) 7 Ch App 680; *Hobson v Bass* (1871) 6 Ch App 792; *Ellis v Emmanuel* (1876) 1 ExD 157, CA; *Re Sass, ex p National Provincial Bank of England* [1896] 2 QB 12; *Re Butlers Wharf Ltd* [1995] 2 BCLC 43, [1995] BCC 717. As to the liabilities of a surety see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1090 et seq.

2 *Re Sass, ex p National Provincial Bank of England* [1896] 2 QB 12, applied in *Ulster Bank Ltd v Lambe* [1966] NI 161; *Re Amalgamated Investment and Property Co Ltd* [1985] Ch 349, [1984] 3 All ER 272; *Re Polly Peck International plc (in administration)* [1996] 2 All ER 433, sub nom *Re Polly Peck International plc (in administration) (No 3)* [1996] 1 BCLC 428. It seems that this rule applies even where the surety's contract does not expressly provide that, as between him and the creditor, the creditor is to have the benefit of all dividends: *Re Sass, ex p National Provincial Bank of England* supra. As to waiver of a surety's rights in favour of the creditor see further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1146. The position is the same even though the payment by the surety may have been made not out of his own money but out of the proceeds of a security given to him by the debtor: *Midland Banking Co v Chambers* (1869) 4 Ch App 398. See also *Re Fernandes, ex p Hope* (1844) 3 Mont D & De G 720; *Re Sellers, ex p Midland Banking Co* (1878) 38 LT 395; *Re Rees, ex p National Provincial Bank of England* (1881) 17 ChD 98, CA; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1148.

3 *Re Sass, ex p National Provincial Bank of England* [1896] 2 QB 12 (if the creditor has received the dividend on the amount so paid by the surety, he will hold it for the surety). See also *Mackinnon's Trustee v Bank of Scotland* 1915 SC 411 (where a surety under a guarantee for payment of all sums up to a stated amount for which the debtor might become liable to the creditor paid the sum for which he was liable before the debtor's bankruptcy, and it was held that this payment went to reduce the debt for which the creditor could prove). Where, at the time of the guarantee of a current account with the bank, the debtor had already, to the bank's

knowledge, but not to the surety's knowledge, committed an act of bankruptcy under the law in force prior to the Insolvency Act 1986 (the equivalent under the 1986 Act being knowledge of the presentation of a bankruptcy petition), the surety's payments were appropriated to such part of the creditor's debt as had been secured before the act of bankruptcy and was provable: *Re Mason, ex p Sharp* (1844) 3 Mont D & De G 490.

4 *Re Walker, Sheffield Banking Co v Clayton* [1892] 1 Ch 621; *Re Yewdall, ex p Barnfather* (1877) 46 LJ Bcy 87 (affd 46 LJ Bcy 109, CA).

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#### 505. Creditor's right of proof against surety.

A creditor may prove against the estate of a bankrupt surety on his guarantee. He must, however, establish the surety's liability, and, in the absence of agreement, this cannot be done merely by showing that the debtor has admitted the debt, or that judgment for it has been signed against him<sup>1</sup>. The creditor must give credit for any amount which he has realised before proving, or for dividends which have been declared in the principal debtor's bankruptcy, even if not actually received<sup>2</sup>; but, where there are several sureties jointly and severally liable, the creditor is entitled to prove against the bankrupt surety's estate for the whole of the debt, without giving credit for any sums received from the other co-sureties since the date of the bankruptcy order, provided that he does not recover more than 100 pence in the pound in all<sup>3</sup>.

Money deposited with the creditor by a co-surety, to be appropriated by the creditor when he thinks fit towards payment, so far as it will go, of the debt, need not be deducted when the creditor proves against the surety's estate before the appropriation<sup>4</sup>.

1 *Re Kitchin, ex p Young* (1881) 17 ChD 668, CA. See also para 494 ante.

2 *Re Blakeley, ex p Aachener Disconto Gesellschaft* (1892) 9 Morr 173. Cf *Re Bunyard, ex p Newton, ex p Griffin* (1880) 16 ChD 330, CA; *Re Firth, ex p Schofield* (1879) 12 ChD 337, CA; *Re Blackburne, ex p Strouts* (1892) 9 Morr 249.

3 *Re Houlder* [1929] 1 Ch 205.

4 *Commercial Bank of Australia Ltd v Wilson & Co's Estate Official Assignee* [1893] AC 181, PC.

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### **506. Surety's right of proof against principal debtor.**

A surety cannot exercise a right of proof in the debtor's bankruptcy, so long as the principal creditor has not been paid in full in respect of the debt guaranteed and has himself proved or is entitled to prove<sup>1</sup>. He is, however, a person to whom an individual may give a preference which may be set aside or adjusted by the court on an application by the trustee of that individual when subsequently adjudged bankrupt<sup>2</sup>. Where a surety, party to a promissory note, pays the note at maturity, he is allowed to prove not only for the principal but also for interest from the date of payment to the date of the bankruptcy order<sup>3</sup>.

No proof may be made by a surety for the cost of maintaining a security, where the principal debt has been extinguished<sup>4</sup>.

1 *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, CA (where the earlier decisions in *Re Parrott, ex p Whittaker* (1891) 8 Morr 49; *Re Paine, ex p Read* [1897] 1 QB 122; *Re Herepath and Delmar, ex p Delmar* (1890) 7 Morr 129 at 190; *Wolmershausen v Gullick* [1893] 2 Ch 514; *Re Blackpool Motor Car Co Ltd, Hamilton v Blackpool Motor Car Co Ltd* [1901] 1 Ch 77 were reviewed). See also *Re Fothergill, ex p Turquand* (1876) 3 ChD 445, CA; *Ex p Wildman* (1750) 1 Atk 109; *Ex p Marshal* (1752) 1 Atk 129; *Ex p Rushforth* (1805) 10 Ves 409 at 416. The difficulty is that there cannot be double proof in respect of the same debt (*Re Oriental Commercial Bank, ex p European Bank* (1871) 7 Ch App 99; *Re Fenton, ex p Fenton Textile Association* supra at 109; and see para 495 ante), so that, if the principal creditor has not been paid off and proves, the surety's proof would not be effective: *Re A Debtor (No 66 of 1955), ex p Debtor v Trustee of Property of Waite (a bankrupt)* [1956] 3 All ER 225, [1956] 1 WLR 1226, CA.

2 See the Insolvency Act 1986 s 340(3); and para 656 post.

3 *Re Evans, ex p Davies* (1897) 4 Mans 114; cf *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400 at 415, CA.

4 *Re Moss, ex p Hallett* [1905] 2 KB 307. Proof has, however, been allowed against the estate of a person who guaranteed payment of interest on a company's debenture until the principal sum should be repaid, even though the company had gone into liquidation and had been dissolved: *Re Fitzgeorge, ex p Robson* [1905] 1 KB 462.

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### **507. Surety's right of proof against co-sureties.**

A surety has a right of proof against a co-surety for a just proportion of the debt when he has paid the creditor's debt and taken an assignment of his securities<sup>1</sup>; and, even if he has not paid the creditor, and his liability has not been ascertained, he will have a right to a declaration that, when he has paid more than his due proportion, the co-surety must contribute, and in respect of that right he will be entitled to prove against the co-surety's estate<sup>2</sup>.

1 *Re Clark, ex p Stokes and Goodman* (1848) De G 618; *Re Parker, Morgan v Hill* [1894] 3 Ch 400, CA. See also *Re Snowdon, ex p Snowdon* (1881) 17 ChD 44, CA.

2 *Wolmershausen v Gullick* [1893] 2 Ch 514. The Limitation Act 1980 will not run against the surety until his liability has been ascertained: *Wolmershausen v Gullick* supra. As to the effect of a compromise with the trustee in bankruptcy of one of several co-sureties see *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541; cf *Re Armitage, ex p Good* (1877) 5 ChD 46, CA; *Re EWA* [1901] 2 KB 642, CA. See also *Re Tuchmann* [1960] CA Transcript 9A; and see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1175.

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### 508. Negotiable instruments.

The 'bankruptcy rules' relating to cheques, bills of exchange and promissory notes apply, notwithstanding anything in the Bills of Exchange Act 1882<sup>1</sup>. Under those 'rules' a holder of a bill or note may proceed against the different parties liable until he has received 100 pence in the pound on it. Thus, if A discounts bills drawn by one firm on another, and both firms become bankrupt, A, holding the bill, is entitled to prove against both estates, and to receive all dividends he can until he receives 100 pence in the pound and interest, whether the drawer is surety for the acceptor or vice versa; for the surety cannot receive anything until the bill-holder is fully paid<sup>2</sup>. If, however, before proof, A has received any payment from any party or any estate liable on the bill, or if any dividend has been declared<sup>3</sup>, he must, when proving, give credit for the amount of that payment or dividend<sup>4</sup>.

If the drawer or indorsee of a bill is bankrupt, notice of dishonour may be given either to the party himself or to his trustee<sup>5</sup>.

Proof may be made in the bankruptcy of the maker of a promissory note payable on demand, even though no demand has been made before the bankruptcy<sup>6</sup>. Proof may be made on a promissory note payable with interest at a fixed period after notice, even though no notice was given<sup>7</sup>.

Unless the trustee allows, a proof in respect of money owed on a bill of exchange, promissory note, cheque or other negotiable instrument or security cannot be admitted unless there is produced the instrument or security itself or a copy of it, certified by the creditor or his authorised representative to be a true copy<sup>8</sup>.



- 1 See the Bills of Exchange Act 1882 s 97(1); and **BILLS OF EXCHANGE AND OTHER NEGOTIABLE INSTRUMENTS**. In *Re Keever (a bankrupt), ex p Trustee of Property of Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631, it was held that the Bills of Exchange Act 1882 s 97(1) refers not to the bankruptcy rules as such, but to bankruptcy law generally.
- 2 *Re Fothergill, ex p Turquand* (1876) 3 ChD 445, CA; and see para 506 ante. See also *Ex p Wildman* (1750) 1 Atk 109; *Ex p Marshal* (1752) 1 Atk 129; *Ex p Rushforth* (1805) 10 Ves 409 at 416.
- 3 *Ex p Leers* (1802) 6 Ves 644; *Re Stein, ex p Royal Bank of Scotland* (1815) 2 Rose 197; *Re Watson, ex p Todd* (1815) 2 Rose 202n.
- 4 *Cooper v Pepys* (1741) 1 Atk 107; *Ex p Rushforth* (1805) 10 Ves 409; *Re Houghton, ex p Tayler* (1857) 1 De G & J 302.
- 5 See the Bills of Exchange Act 1882 s 49(10) and **BILLS OF EXCHANGE AND OTHER NEGOTIABLE INSTRUMENTS**; cf *Re Bellman, ex p Baker* (1877) 4 ChD 795, CA. As to notice of dishonour generally see **BILLS OF EXCHANGE AND OTHER NEGOTIABLE INSTRUMENTS**.
- 6 *Ex p Beaufoy* (1787) 1 Cooke's Bankrupt Laws (8th Edn) 180; *Re Mayor, ex p Whitworth* (1841) 2 Mont D & De G 158. Cf the Bills of Exchange Act 1882 s 87(1); and **BILLS OF EXCHANGE AND OTHER NEGOTIABLE INSTRUMENTS**.
- 7 *Re Mantle, ex p Elgar* (1826) 2 Gl & J 1; *Re Dowman, ex p Dowman* (1827) 2 Gl & J 241; *Clayton v Gosling* (1826) 5 B & C 360, explained in *Re Browne and Wingrove, ex p Ador* [1891] 2 QB 574 at 579, CA. As to the amount payable on a future debt see para 602 post.
- 8 See the Insolvency Rules 1986, SI 1986/1925, r 6.108; and para 571 post.

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### 509. Debts secured by bills of larger amount.

Where bills have been given by the bankrupt to a creditor for a debt, and the creditor still holds them at the date of the bankruptcy order, he may prove only for the actual amount of the debt remaining due, even though the amount of the bills is greater<sup>1</sup>; and the same is true where the bills have been received by the creditor in pursuance of a guarantee given to him by the bankrupt as surety for a debtor<sup>2</sup>.

Where, however, there is no immediate contract between the creditor and the surety, as where the debtor hands the creditor bills bearing the names of third parties as collateral security for a debt less than the amount of the bills, the creditor may prove in their bankruptcies for the full amount of the bills<sup>3</sup>, though he may not receive more than the amount actually due to him in respect of principal<sup>4</sup> and interest accrued on it, whether before or after the bankruptcy order<sup>5</sup>.

1 *Ex p Bloxham* (1802) 6 Ves 600; *Re Willats, ex p Reader* (1819) Buck 381.

2 *Re Willats, ex p Reader* (1819) Buck 381.

3 *Ex p Bloxham* (1802) 6 Ves 600; *Re Willats, ex p Reader* (1819) Buck 381; *Re Corson, ex p De Tastet* (1810) 1 Rose 10. It is immaterial that the bills were accepted for the debtor's accommodation: *Re Bunyard, ex p Newton, ex p Griffin* (1880) 16 ChD 330, CA.

4 *Re Corson, ex p De Tastet* (1810) 1 Rose 10; *Re Firth, ex p Schofield* (1879) 12 ChD 337, CA.

5 *Re Fowler, ex p Martin* (1814) 2 Rose 87; *Re Peirson and Sammon, ex p Sammon* (1832) 1 Deac & Ch 564; *Re Wood, ex p Fairlie, Bonham & Co* (1833) 3 Deac & Ch 285; *Re Caldwell, ex p Reed* (1833) 3 Deac & Ch 481; *Re Joint Stock Discount Co, Warrant Finance Co's Case* (1869) 5 Ch App 86.

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### 510. Payment of part of debt proved for.

A creditor with several separate debts cannot, by means of his form of proof, obtain more than 100 pence in the pound and interest<sup>1</sup>, if any, on each of them. Thus, a creditor who has discounted for the bankrupt several bills drawn by the bankrupt may not prove for a bill that has been paid by the acceptor, though others remain unpaid, and a proof made before payment will, after payment, be expunged, so far as it will go<sup>2</sup>. Thus, where the bankrupt has indorsed bills to the creditor by way of collateral security, and any of them has been paid in full by another party, the creditor must deduct the amount so paid from his proof or refund the proper amount from any dividend paid<sup>3</sup>.

1 As to interest see the Insolvency Act 1986 s 322(2); and para 545 post.

2 *Re Cowell, ex p Barratt* (1823) 1 Gl & J 327, followed in *Re Morris, James v London and County Banking Co* [1899] 1 Ch 485, CA (where a bank, holder of four bills, two of which were drawn by A and accepted by B, and two drawn by C and accepted by D, and all indorsed by the debtor, was not entitled to apply the surplus over 100 pence in the pound received from various sources on the first two bills to meet a deficiency on the other two; this the bank attempted to do by consolidating its debts and securities).

3 *Re Moulson, ex p Burn* (1814) 2 Rose 55; *Bentley, ex p Brunskill* (1835) 4 Deac & Ch 442. See also *Re Cowell, ex p Barratt* (1823) 1 Gl & J 327; *Re Pritchard, ex p Hornby* (1844) De G 69.

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### **511. Proof by pledgee of bill.**

If a bill handed by the bankrupt to his creditor, even though indorsed<sup>1</sup>, was intended to be merely by way of deposit or pledge, it appears that the creditor should, before proof, sell or value the bill<sup>2</sup>. Where a bill is deposited by the acceptor with A, and A pledges it with B, the proof of B, who has no general property in the bill against the acceptor's estate in bankruptcy, would depend on the state of the accounts between the acceptor and A<sup>3</sup>.

1 The indorsement would prima facie indicate that it was intended to pass the property in the bill with full remedies against all parties: *Ex p Twogood* (1812) 19 Ves 229.

2 *Ex p Baldwin* (1799) cited in 19 Ves at 230; Insolvency Rules 1986, SI 1986/1925, r 6.109 (see para 561 post), r 6.115 (see para 562 post); and as to the redemption of security by the trustee see para 564 post. See also *Re Early and Smith, ex p Early's Executors* (1866) 14 LT 296.

3 *Re Cloughton, ex p Britten* (1833) 3 Deac & Ch 35; *Re Barker, ex p Philipps* (1840) 1 Mont D & De G 232.

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### **512. Purchase of bills of exchange.**

Where, in good faith, a person purchases bills, to which the debtor is a party, for less than their face value, proof may be made for the whole amount<sup>1</sup>. Proof is also allowed by a creditor who has made a fresh advance against bills given for that advance and for a debt provable in a former bankruptcy<sup>2</sup>. Discount need not be deducted in proving on a bill discounted<sup>3</sup>.

1 *Ex p Lee* (1721) 1 P Wms 782; *Jones v Gordon* (1877) 2 App Cas 616 at 622, 631, 632, HL. It is otherwise where the purchaser knows that the bills were issued with the intention of defeating creditors in bankruptcy: *Jones v Gordon* supra; cf para 499 note 1 ante; and see **BILLS OF EXCHANGE AND OTHER NEGOTIABLE INSTRUMENTS**.

2 *Re Aylmer, ex p Aylmer* (1894) 1 Mans 391; cf *Re Bonacina, Le Brasseur v Bonacina* [1912] 2 Ch 394, CA.

3 *Ex p Marlar* (1746) 1 Atk 150.

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### **513. Accommodation bills.**

A person who puts his name on a bill for the accommodation of another stands in the position of a surety, and, if he takes up the bill, he may prove in the other's bankruptcy<sup>1</sup>. Where there is mutual accommodation paper and a bankruptcy of one party, the solvent party must, before proof, take up his own paper and so relieve the bankrupt's estate<sup>2</sup>. If both parties become bankrupt, there can be no proof on either side in respect of the accommodation paper, but, if there is a cash balance on either side, proof may be made for that<sup>3</sup>. If, however, after satisfying the holders of the bills, the estate ultimately indebted in the accommodation transactions has any surplus, proof may be made against it in respect of those transactions<sup>4</sup>.

1 *Haigh v Jackson* (1838) 3 M & W 598. See also para 506 ante; and *Re Oriental Commercial Bank, ex p European Bank* (1871) 7 Ch App 99; *Re Fothergill, ex p Turquand* (1876) 3 ChD 445, CA.

2 *Re Bowness and Padmore* (1789) 1 Cooke's Bankrupt Laws (8th Edn) 183; and see *Re Lynn, ex p Read* (1822) 1 Gl & J 224.

3 *Ex p Walker* (1798) 4 Ves 373; *Ex p Earle* (1800) 5 Ves 833.

4 *Ex p Rawson, ex p Lloyd* (1821) Jac 274; *Re Living, ex p Laforest, ex p Wetherell* (1833) 2 Deac & Ch 199. See also *Ex p Metcalfe* (1805) 11 Ves 404 (where, on a proof for cash balance, dividends were retained). Where, however, A, at the time of his bankruptcy, owed B a cash balance but had given him bills negotiated by B in respect of part of it, and the bills had been proved against A's estate, the proof of the trustee of B's estate was confined to the difference between the cash balance and the acceptances given in respect of it, although B had accepted bills for A on a consideration which failed, and these had also been negotiated and proved against B's estate: *Re Charles, ex p Macredie* (1873) 8 Ch App 535. See also *Re London, Bombay and Mediterranean Bank, ex p Cama* (1874) 9 Ch App 686.

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### **514. Proof by bona fide holder of bill.**

Whether a bill is accepted for value or for the accommodation of the drawer, a bona fide holder for valuable consideration, to whom the bill has been transferred by the drawer as security for

a debt less than the amount of the bill, may prove against the acceptor's estate for the whole amount of the bill, and receive dividends until he has received the whole debt<sup>1</sup>.

If the bankrupt has accepted bills against a loan and given security, and the creditor discounts the bills, the security should be applied in taking up the bill so as to relieve the estate from proof by the holder<sup>2</sup>.

1 *Re Bunyard, ex p Newton, ex p Griffin* (1880) 16 ChD 330, CA.

2 *Re Kattengell, ex p Mann* (1877) 5 ChD 367, CA. The creditor cannot so deal with his debt as to divide it into two debts, and, by so doing, evade the bankruptcy law as to security: *Baines v Wright* (1885) 16 QBD 330, CA.

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### **515. Unindorsed bills.**

Where the creditor takes a bill for an existing debt without obtaining the debtor's indorsement, and the bill turns out to be worthless, the creditor may prove in the debtor's bankruptcy in respect of the debt; but, if there is no existing debt, and the bill is discounted without indorsement, this is a mere purchase of the bill, and there is no right of proof<sup>1</sup>.

1 *Ex p Blackburne* (1804) 10 Ves 204 at 206. See also *Re Goodchild, ex p Hustler* (1821) 1 Gl & J 9.

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### **516. Foreign bills.**

The drawer of a foreign bill of exchange accepted in England and dishonoured and protested may prove for damages in the nature of re-exchange against the acceptor's estate, whether he has paid these damages before the date of the bankruptcy order<sup>1</sup>, or remains liable to pay them<sup>2</sup>.

<sup>1</sup> *Francis v Rucker* (1768) Amb 672; *Walker v Hamilton* (1860) 1 De GF & J 602; *Re General South American Co* (1877) 7 ChD 637.

<sup>2</sup> *Re Gillespie, ex p Robarts* (1886) 18 QBD 286; and see *Re Commercial Bank of South Australia* (1887) 36 ChD 522. As to a bill dishonoured abroad see **BILLS OF EXCHANGE AND OTHER NEGOTIABLE INSTRUMENTS**.

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#### **517. Bill brokers.**

A bill broker who discounts bills for an acceptor and then rediscounts them with his bank may prove in the acceptor's bankruptcy for the amount paid to the bank, even though the broker has not indorsed the bills, but is liable to the bank by virtue of a general guarantee given to the bank in respect of all bills discounted with it<sup>1</sup>.

<sup>1</sup> *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA; and see **BILLS OF EXCHANGE AND OTHER NEGOTIABLE INSTRUMENTS**.

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#### **518. Calls on shares.**

A company<sup>1</sup>, or its liquidator in its name and on its behalf<sup>2</sup>, may prove against a bankrupt's estate for the estimated value of the bankrupt's liability to future calls, as well as for calls already made<sup>3</sup>.

If a contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his trustee in bankruptcy represents him for all purposes of the winding up, and is a contributory accordingly<sup>4</sup>. The trustee may be called on to admit to proof against the bankrupt's estate, or otherwise allow to be paid out of the bankrupt's assets in due course of law, any money due from the bankrupt in respect of his liability to contribute to the company's assets<sup>5</sup>.

Where a company under its articles of association has forfeited shares for non-payment of money due on allotment and for calls, and the articles provide that, notwithstanding forfeiture, the ex-shareholder is to be liable to pay all calls or other money owing on the shares at the time of the forfeiture, then, if the shares are subsequently sold and re-allotted to other persons at a loss, the company, on the subsequent bankruptcy of the ex-shareholder, is entitled to prove only for the actual loss suffered, that is, the difference between the amount received on the re-allotment of the forfeited shares and the amount due at the date of the forfeiture<sup>6</sup>.

1 *Re Mercantile Mutual Marine Insurance Association* (1883) 25 ChD 415; *Re McMahon, Fuller v McMahon* [1900] 1 Ch 173.

2 See the Insolvency Act 1986 s 167(1)(b), Sch 4 para 8; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) para 577; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) para 709.

3 See *ibid* s 82(4); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) para 709. Where shares are disclaimed, proof may be allowed for the whole balance unpaid on them, deducting the value of anything accruing to the company by reason of the disclaimer: *Re Hallet, ex p National Insurance Co* (1894) 1 Mans 380. Where, however, the bankrupt is only under contract to take up shares, and this contract is disclaimed, proof is allowed only in respect of damages for this breach of contract: *Re Hookey, ex p United Ordnance and Engineering Co Ltd* [1899] 2 QB 579; and see para 488 ante. As to proof in respect of non-delivery of goods see *Re Voss, ex p Llansamlet Tin Plate Co* (1873) LR 16 Eq 155.

If the dividend is less than 100 pence in the pound, payment of it does not entitle the bankrupt's estate to rank as a fully-paid shareholder in the company's liquidation: *Re West Coast Gold Fields Ltd, Rowe's Trustee's Claim* [1906] 1 Ch 1, CA.

4 See the Insolvency Act 1986 s 82(1), (2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) para 709.

5 See *ibid* s 82(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) para 709.

6 *Re Bolton, ex p North British Artificial Silk Ltd* [1930] 2 Ch 48.

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### 519. Rent.

After the disclaimer of a lease<sup>1</sup>, a landlord may prove for the loss or damage which he has sustained in consequence of the operation of the disclaimer, which is normally measured by reference to the difference between the rent and other payments which the landlord would have received in future but for the disclaimer and the rents and other payments which the disclaimer will enable him to receive by reletting<sup>2</sup>.

The assignor of a lease holding a covenant of indemnity from the assignee may, on the assignee's bankruptcy, prove for a portion of the rent until the premises can be relet, for the loss, if any, in the letting value, and also for a sum in respect of dilapidations against which he has been indemnified<sup>3</sup>.

In the case of rent and other payments of a periodical nature, the creditor may prove for any amounts due and unpaid up to the date of the bankruptcy order<sup>4</sup>. Where at that date any payment was accruing due, the creditor may prove for so much as would have fallen due at that date, if accruing from day to day<sup>5</sup>.

Where a lease is existing and has not been disclaimed, the landlord cannot prove in the tenant's bankruptcy for rent which has not become due and payable<sup>6</sup>.

1 As to disclaimer of leases by the trustee see para 472 et seq ante.

2 *Christopher Moran Holdings Ltd v Bairstow* [2000] 2 AC 172, sub nom *Re Park Air Services plc, Christopher Moran Holdings Ltd v Bairstow* [1999] 1 All ER 673, HL (as in the case of an award for wrongful termination of contract, allowance will be made for accelerated receipt of any sums which had not fallen due at the date of breach, and which the contract did not make immediately due and payable in the event of breach). As to the limitation of the amount recoverable for dilapidations see the Landlord and Tenant Act 1927 s 18(1); and para 488 note 2 ante.

3 *Re Carruthers, ex p Tobit* (1895) 2 Mans 172.

4 See the Insolvency Rules 1986, SI 1986/1925, r 6.112(1); and para 544 post.

5 See *ibid* r 6.112(2); and para 544 post.

6 *Christopher Moran Holdings Ltd v Bairstow* [2000] 2 AC 172, sub nom *Re Park Air Services plc, Christopher Moran Holdings Ltd v Bairstow* [1999] 1 All ER 673, HL. As to proof in the liquidation of a company see further **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) para 749 et seq.

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### 520. Insurance money.



Where premises are burned down and the tenant who is bound to reinstate them becomes bankrupt, proof may be allowed for the sum required to reinstate them, without deducting anything which the landlord has already received from an insurance company<sup>1</sup>.

1 *Re Blackburne, ex p Strouts* (1892) 9 Morr 249. The creditor would presumably be a trustee for the insurance company of the dividends received on his proof, in circumstances where the insurance company would have had a subrogated claim against the tenant, now bankrupt: see **INSURANCE** vol 25 (2003 Reissue) para 199.

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### **521. Counsel's fees.**

A solicitor cannot pledge his client's credit to counsel, instructed on the client's behalf; counsel has, therefore, no right of proof for his fees, whether for litigious or non-litigious work, against the client's estate, even if the client has not paid them to the solicitor<sup>1</sup>. If the solicitor has received the fees and, not having paid them, becomes bankrupt, counsel would not, it seems, be entitled to prove for them<sup>2</sup>; but, if the fees are received by the trustee after bankruptcy, they should be paid to counsel<sup>3</sup>. If the trustee receives a lump sum from the client in settlement of the solicitor's whole bill of costs, it may be that a proportionate amount of it should be paid to counsel for his fees<sup>4</sup>.

1 *Mostyn v Mostyn* (1870) 5 Ch App 457; *Rondel v Worsley* [1969] 1 AC 191, [1967] 3 All ER 993, HL.

2 *Wells v Wells* [1914] P 157 at 166, CA; *Re Sandiford (No 2), Italo-Canadian Corpn Ltd v Sandiford* [1935] Ch 681; both those decisions having been approved in *Rondel v Worsley* [1969] 1 AC 191, [1967] 3 All ER 993, HL: see eg at 279 and at 1031 per Lord Upjohn. It would seem, however, that, if counsel has entered into a contract with the solicitor concerning his fees, counsel should be entitled to prove for them.

3 *Re Hall* (1856) 2 Jur NS 1076; but this decision was doubted in *Wells v Wells* [1914] P 157, CA.

4 *Re Clift, ex p Colquhoun* (1890) 38 WR 688. It is not clear whether the trustee could agree to accept a lump sum from the client, excluding counsel's fees.

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## **522. Proof by secured creditors.**

If a secured creditor<sup>1</sup> realises his security, he may prove for the balance of his debt, after deducting the amount realised<sup>2</sup>. If a secured creditor voluntarily surrenders his security for the general benefit of creditors, he may prove for his whole debt, as if it were unsecured<sup>3</sup>.

If a secured creditor omits to disclose his security in his proof of debt, he must surrender his security for the general benefit of creditors, unless the court, on application by him, relieves him from the effect of this provision on the ground that the omission was inadvertent or the result of honest mistake<sup>4</sup>. If the court grants that relief, it may require or allow the creditor's proof of debt to be amended, on such terms as may be just<sup>5</sup>.

1 For the meaning of 'secured creditor' see para 560 post.

2 See the Insolvency Rules 1986, SI 1986/1925, r 6.109(1); and para 561 post.

3 See *ibid* r 6.109(2); and para 561 post.

4 See *ibid* r 6.116(1); and para 563 post.

5 See *ibid* r 6.116(2); and para 563 post.

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## **523. Executors.**

In general, one of several executors may prove on behalf of himself and the others<sup>1</sup>. If an executor refuses to make a proof, a residuary legatee or other person interested may be given permission to prove<sup>2</sup>.

Where a sole executor becomes bankrupt, it seems that he cannot prove in his representative capacity against himself without a court order<sup>3</sup>. In such a case, a legatee may apply for permission to prove<sup>4</sup>.

1 *Re Manning, ex p Smith and Anderdon* (1836) 1 Deac 385; *Re Wright, ex p Phillips* (1837) 2 Deac 334. See also *Re Davis, ex p Courtney* (1835) 2 Mont & A 227 (where one of two executors became bankrupt).

2 *Re Strahan, Paul and Bates, ex p Caldwell* (1865) 13 WR 952.

3 *Re Howard and Gibbs, ex p Shaw* (1822) 1 Gl & J 127; *Re Colman, ex p Colman* (1833) 2 Deac & Ch 584.

4 *Re Warne, ex p Moody* (1816) 2 Rose 413; *Re Boyes, ex p Beilby*, *Re Boyes, ex p Hall and Boyes* (1821) 1 Gl & J 167. Proof may be made in respect of a legacy against an executor who has received assets: *Walcott v Hall* (1788) 2 Bro CC 305; *Re Warne, ex p Moody* (1816) 2 Rose 413.

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### 524. Trustees and beneficiaries.

All trustees should, if possible, join in a proof<sup>1</sup>.

Where one of two trustees who have committed a breach of trust becomes bankrupt, proof for the full amount of the trust money lost may be made against the bankrupt's estate, even though a sum by way of compromise has been received from the other trustee<sup>2</sup>.

Where trustees have become bankrupt, the beneficiaries may themselves prove against the bankrupt estate with the permission of the court<sup>3</sup>.

1 *Re Manning, ex p Smith and Anderdon* (1836) 2 Mont & A 536; *Re Wright, ex p Phillips* (1837) 2 Deac 334.

2 *Edwards v Hood-Barrs* [1905] 1 Ch 20. See also *Re Lake, ex p Howe Trustees* [1903] 1 KB 439 (where the beneficiaries' right of proof was affected by the compromise of an action without the permission of the trustee in bankruptcy of their trustee); *Re Macfadyen, ex p Vizianagaram Mining Co Ltd* [1908] 2 KB 817, CA (where a proof was allowed both against the joint estate of a firm and the separate estate of a defaulting trustee). As to remedies against trustees see *Re Ridgway, ex p Mein* (1886) 3 Morr 212; *Smith v Patrick* [1901] AC 282 at 295, HL. As to the trustee's liability for a breach of trust generally see **TRUSTS** vol 48 (2007 Reissue) para 1084 et seq.

3 *Re Bradley, ex p Walton* (1910) 54 Sol Jo 377.

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## 525. Other provable debts.

A release given to a debtor in a deed of arrangement which is afterwards superseded by a bankruptcy will not prevent proof in the bankruptcy, unless it is clear that it was intended that it should do so<sup>1</sup>.

A creditor who has accounted to the trustee for money or goods received from the bankrupt by way of preference<sup>2</sup> may prove for his debt with the other creditors<sup>3</sup>.

Where, on the true construction of a contract, a sum named to be paid for breach of contract is to be regarded as a penalty<sup>4</sup>, proof will be allowed only for the actual damage sustained<sup>5</sup>.

Proof may be made on an implied promise to indemnify<sup>6</sup>.

In the absence of novation, a mortgagee cannot prove against the estate of the assignee of the equity of redemption for arrears of interest, even though the latter has paid some interest<sup>7</sup>.

Commission for finding a purchaser is provable, even though the actual sale is not carried out until after bankruptcy<sup>8</sup>. If, however, according to the terms of the contract of agency, no commission is payable unless the property is sold<sup>9</sup>, and the sale is completed by the trustee after the bankruptcy order, then it would seem that the trustee might be held to have adopted the contract with the agent, and the agent might be entitled to his commission in full from the trustee.

1 *Re Stephenson, ex p Official Receiver* (1888) 20 QBD 540, DC; and see *Re Clement, ex p Goas* (1886) 3 Morr 153, CA; *Re Stock, ex p Amos* (1896) 3 Mans 324. As to the effect of bankruptcy on an individual voluntary arrangement see para 123 ante.

2 As to the avoidance of transactions on grounds of preference see para 653 et seq post.

3 *Re Stephenson, ex p Official Receiver* (1888) 20 QBD 540. As to proof under a bankrupt's marriage settlement see *Re Tonnies, ex p Bishop* (1873) 8 Ch App 718; *Re Knight, ex p Cooper* (1885) 2 Morr 223. Cf *Re Cawley, Clancy v Munster and Leinster Bank Ltd* [1959] IR 330.

4 As to the criteria applicable in determining what is a penalty see *Bridge v Campbell Discount Co Ltd* [1962] AC 600, [1962] 1 All ER 385, HL; and **DAMAGES** vol 12(1) (Reissue) para 1065 et seq.

5 *Re Newman, ex p Capper* (1876) 4 ChD 724, CA. See the observations on that case in *Wallis v Smith* (1882) 21 ChD 243, CA, and on this latter case in *Willson v Love* [1896] 1 QB 626, CA; and see **DAMAGES**.

6 *Re Chappell, ex p Ford* (1885) 16 QBD 305, CA (mortgagee postponing his security at mortgagor's request).

7 *Re Errington, ex p Mason* [1894] 1 QB 11.

8 *Re Beale, ex p Durrant* (1888) 5 Morr 37.

9 As to the construction of provisions as to remuneration in contracts of agency see **AGENCY** vol 1 (2008) PARA 101 et seq.

## UPDATE

### 490-572 Proof of debts

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(i) Debts Provable in Bankruptcy/526. Alien enemies.

## 526. Alien enemies.

The benefit of all debts and claims which would, but for the existence of a state of war, be provable in bankruptcy, or under an approved voluntary arrangement by a person who is an enemy within the meaning of the Trading with the Enemy Act 1939<sup>1</sup>, and all securities for the same vest in the Custodian of Enemy Property<sup>2</sup>. At common law, the alien enemy's right to recover the debt is only suspended, and a claim, therefore, would be a future liability which the trustee would be bound to assess<sup>3</sup>, retaining the money until the end of the war<sup>4</sup>.

1 See the Trading with the Enemy Act 1939 s 2(1) (as amended); and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) para 577.

2 See the Trading with the Enemy (Insolvency) Order 1940, SR & O 1940/1419, art 1; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) para 586.

3 See para 493 ante.

4 *Ex p Boussmaker* (1806) 13 Ves 71 (where the court ordered that the claim be entered and the dividend be reserved); *Porter v Freudenberg* [1915] 1 KB 857 at 873, 874, CA; *Re Hilckes, ex p Muhesa Rubber Plantations Ltd* [1917] 1 KB 48 at 60, CA per Scrutton LJ. As to the test of whether a person or a corporate body is an enemy alien see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) para 574. An alien enemy cannot appeal, during hostilities, against the trustee's decision as to his proof: *Re Wilson and Wilson, ex p Marum* (1915) 84 LJB 1893.

## UPDATE

### 490-572 Proof of debts

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(i) Debts Provable in Bankruptcy/527. Consumer credit; extortionate credit transactions.

## 527. Consumer credit; extortionate credit transactions.

Where a person is adjudged bankrupt who is or has been a party to a transaction for, or involving, the provision to him of credit, the court may, on the application of the trustee of the bankrupt's estate, make an order with respect to the transaction if the transaction is or was extortionate and was not entered into more than three years before the commencement of the bankruptcy<sup>1</sup>.

1 See the Insolvency Act 1986 s 343(1), (2); and para 672 et seq post. As to petitions by moneylenders see the Insolvency Rules 1986, SI 1986/1925, r 6.20 and para 175 ante; and as to proofs by licensed moneylenders see r 6.102 and para 534 post.

**UPDATE****490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/528. Meaning of 'prove'.

**(ii) Procedure for Proving****528. Meaning of 'prove'.**

A person claiming to be a creditor of the bankrupt and wishing to recover his debt in whole or in part must<sup>1</sup> submit his claim in writing to the official receiver, where acting as receiver and manager, or to the trustee<sup>2</sup>. The creditor is referred to as 'proving' for his debt; and the document by which he seeks to establish his claim is his 'proof'<sup>3</sup>.

A proof must be in the form known as 'proof of debt', whether the form prescribed or a substantially similar form, which must be made out by or under the directions of the creditor, and signed by him or a person authorised in that behalf<sup>4</sup>. Where a debt is due to a Minister of the Crown or a government department, the proof need not be in that form, provided that there are shown all such particulars of the debt as are required in the form used by other creditors, and as are relevant in the circumstances<sup>5</sup>.

In certain circumstances<sup>6</sup> the proof must be in the form of an affidavit<sup>7</sup>.

1    le subject to any order of the court under the Insolvency Rules 1986, SI 1986/1925, r 6.93(2): see para 288 ante. For a case where proof was dispensed with in corporate insolvency see *Re Theo Garvin Ltd* [1969] 1 Ch 624, [1967] 3 All ER 497 (claims for interest on money accepted as deposit).

2    Insolvency Rules 1986, SI 1986/1925, r 6.96(1).

3    Ibid r 6.96(2). As to the supply of forms see para 529 post; and as to the contents of a proof see para 530 post.

4    Ibid r 6.96(3). For the prescribed form of proof of debt see rr 6.96, 12.7(1), (2), Sch 4, Form 6.37.

Where an existing trustee proves in a later bankruptcy under the Insolvency Act 1986 s 335(5) (see para 608 post), the proof must be in the prescribed form: Insolvency Rules 1986, SI 1986/1925, r 6.96(5). For the prescribed form of proof by an existing trustee as a claim in a later bankruptcy see rr 6.96, 12.7(1), (2), Sch 4, Form 6.38.

5    Ibid r 6.96(4).

6    See para 531 post.

7    Insolvency Rules 1986, SI 1986/1925, r 6.96(6). A witness statement may not be used: see r 7.57(6) (as substituted); and para 793 post.

**UPDATE****490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **528 Meaning of 'prove'**

NOTE 4--SI 1986/1925 Sch 4 Form 6.37 substituted: SI 2004/584.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/529. Supply of forms.

## **529. Supply of forms.**

Forms of proof must be sent out by the official receiver or the trustee to every creditor of the bankrupt who is known to the sender, or is identified in the bankrupt's statement of affairs<sup>1</sup>.

The forms must accompany, whichever is first:

- 682 (1) the notice to creditors of the official receiver's decision not to call meetings of creditors<sup>2</sup>; or
- 683 (2) the first notice calling a meeting of creditors<sup>3</sup>; or
- 684 (3) where a certificate of summary administration has been issued by the court, the notice sent by the official receiver to creditors of the making of the bankruptcy order<sup>4</sup>; or
- 685 (4) where a trustee is appointed by the court, the notice of his appointment sent by him to creditors<sup>5</sup>, unless the trustee advertises his appointment, with the permission of the court<sup>6</sup>, in which case he must send proofs to the creditors within four months after the date of the bankruptcy order<sup>7</sup>.

The above provisions are subject to any order of the court dispensing with the requirement to send out forms of proof, or altering the time at which the forms are to be sent<sup>8</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.97(1) (amended by SI 1987/1919).

2 *Ie* under the Insolvency Act 1986 s 293(2): see para 318 ante.

3 See paras 265, 266 ante.

4 *Ie* under the Insolvency Rules 1986, SI 1986/1925, r 6.49(2): see para 208 ante.

5 *Ibid* r 6.97(2). As to the applicable provisions relating to the giving of notice of the appointment of a trustee by the court see para 322 ante.

6 *Ie* under the Insolvency Act 1986 s 297(7): see para 322 ante.

7 Insolvency Rules 1986, SI 1986/1925, r 6.97(3).

8 *Ibid* r 6.97(4).

## **UPDATE**

### **490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **529 Supply of forms**

TEXT AND NOTES--A form of proof shall be sent to any creditor of the bankrupt by the official receiver or trustee where the creditor so requests: SI 1986/1925 r 6.97 (substituted by SI 2004/584).

NOTE 5--SI 1986/1925 r 6.97(2) amended: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/530. Contents of proof.

## **530. Contents of proof.**

The following matters must be stated in a creditor's proof of debt<sup>1</sup>:

- 686 (1) the creditor's name and address;
- 687 (2) the total amount of his claim as at the date of the bankruptcy order<sup>2</sup>;
- 688 (3) whether or not that amount includes outstanding uncapitalised interest<sup>3</sup>;
- 689 (4) whether or not the claim includes value added tax;
- 690 (5) whether the whole or any part of the debt falls within any, and if so which, of the categories of preferential debts<sup>4</sup>;
- 691 (6) particulars of how and when the debt was incurred by the debtor;
- 692 (7) particulars of any security held, the date when it was given and the value which the creditor puts on it<sup>5</sup>; and
- 693 (8) the name, address and authority of the person signing the proof, if other than the creditor himself<sup>6</sup>.

There must be specified in the proof any documents by reference to which the debt can be substantiated; but, subject to the following provision, it is not essential that such documents be attached to the proof or submitted with it<sup>7</sup>.

The trustee, or the chairman or convener of any meeting, may call for any document or other evidence to be produced to him, where he thinks it necessary for the purpose of substantiating the whole or any part of the claim made in the proof<sup>8</sup>.

1    le subject to the Insolvency Rules 1986, SI 1986/1925, r 6.96(4) (debt due to a Minister of the Crown or government department): see para 528 ante.

2    As to bankruptcy orders see para 195 et seq ante.

3    As to the provisions relating to interest on debts see para 585 post.

4    le under the Insolvency Act 1986 s 386, Sch 6 (as amended) as read with the Social Security Pensions Act 1975 s 58, Sch 3 (repealed: see now the Pension Schemes Act 1993 s 128, Sch 4 (as amended)); and **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) para 859). As to preferential creditors see para 577 et seq post.

5    As to secured creditors see para 560 et seq post.



6 Insolvency Rules 1986, SI 1986/1925, r 6.98(1) (amended by SI 1987/1919). For the prescribed form of proof of debt see the Insolvency Rules 1986, SI 1986/1925, rr 6.96, 12.7(1), (2), Sch 4, Form 6.37.

7 Ibid r 6.98(2). If the claim is made under a negotiable instrument, a certified copy of the negotiable instrument must be produced, unless the trustee otherwise allows: see r 6.108; and para 571 post.

8 Ibid r 6.98(3).

## **UPDATE**

### **490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **530 Contents of proof**

TEXT AND NOTES 2-6--SI 1986/1925 r 6.98(1) substituted by SI 2004/1070. Head (1), if the creditor is a company, its company registration number must be stated in the creditor's proof of debt: SI 1986/1925 r 6.98(1)(a) (as so substituted). Head (5) omitted: r 6.98 (as so substituted).

NOTE 6--SI 1986/1925 Sch 4 Form 6.37 substituted: SI 2004/584.

TEXT AND NOTE 8--After 'trustee' read ', the official receiver, acting as receiver and manager': SI 1986/1925 r 6.98(3) amended: SI 2004/584.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/531. Claim established by affidavit.

### **531. Claim established by affidavit.**

If he thinks it necessary, the trustee may require a claim of debt to be verified by means of an affidavit<sup>1</sup>, for which purpose there must be used the form known as 'affidavit of debt'<sup>2</sup>; and an affidavit may be required notwithstanding that a proof of debt has already been lodged<sup>3</sup>. The affidavit may be sworn before an official receiver or deputy official receiver, or before an officer of the Department of Trade and Industry or of the court duly authorised in that behalf<sup>4</sup>.

1 A witness statement may not be used: see the Insolvency Rules 1986, SI 1986/1925, r 7.57(6) (as substituted); and para 793 post.

2 Ibid r 6.99(1). For the prescribed form of affidavit of debt see rr 6.99, 12.7(1), (2), Sch 4, Form 6.39.

3 Ibid r 6.99(2).

4 Ibid rr 6.99(3), 13.13(2).

## **UPDATE**

### **490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **531 Claim established by affidavit**

TEXT AND NOTES--SI 1986/1925 r 6.99, Sch 4 Form 6.39 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/532. Cost of proving.

### **532. Cost of proving.**

Every creditor bears the cost of proving his own debt, including such as may be incurred in providing documents or evidence substantiating the claim made in the proof<sup>1</sup>; and costs incurred by the trustee in estimating the value of a bankruptcy debt not bearing a certain value<sup>2</sup> fall on the estate, as an expense of the bankruptcy<sup>3</sup>.

The above provisions apply unless the court otherwise orders<sup>4</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.100(1). As to providing such documents as evidence see r 6.98(3); and para 530 ante.

<sup>2</sup> le under the Insolvency Act 1986 s 322(3): see para 493 ante.

<sup>3</sup> Insolvency Rules 1986, SI 1986/1925, r 6.100(2).

<sup>4</sup> Ibid r 6.100(3).

## **UPDATE**

### **490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/533. Trustee to allow inspection of proofs.

### **533. Trustee to allow inspection of proofs.**

The trustee must, so long as proofs lodged with him are in his hands, allow them to be inspected, at all reasonable times on any business day<sup>1</sup>, by any of the following persons:

- 694 (1) any creditor who has submitted his proof of debt, unless his proof has been wholly rejected for purposes of dividend or otherwise<sup>2</sup>;
- 695 (2) the bankrupt; and

696 (3) any person acting on behalf of either of the above<sup>3</sup>.

- 1 For the meaning of 'business day' see para 95 note 11 ante.
- 2 As to rejection of proofs for purposes of dividend see para 536 post.
- 3 Insolvency Rules 1986, SI 1986/1925, r 6.101.

## **UPDATE**

### **490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/534. Proof of licensed moneylender.

### **534. Proof of licensed moneylender.**

A proof of debt in respect of a moneylending transaction made before 27 January 1980<sup>1</sup>, where the creditor was at the time of the transaction a licensed moneylender<sup>2</sup>, must have indorsed on or annexed to it a statement setting out in detail the particulars mentioned<sup>3</sup> in the Moneylenders Act 1927<sup>4</sup>.

- 1 As to the significance of this date see para 175 note 1 ante.
- 2 Ie licensed under the Moneylenders Acts 1900 to 1927 (repealed).
- 3 Ie the details mentioned in the Moneylenders Act 1927 s 9(2) (repealed): see para 175 note 3 ante.
- 4 Insolvency Rules 1986, SI 1986/1925, r 6.102.

## **UPDATE**

### **490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **534 Proof of licensed moneylender**

TEXT AND NOTES--SI 1986/1925 r 6.102 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/535. Transmission of proofs to trustee.

### 535. Transmission of proofs to trustee.

Where a trustee is appointed, the official receiver must forthwith transmit to him all the proofs which he has so far received, together with an itemised list of them<sup>1</sup>. The trustee must sign the list by way of receipt for the proofs, and return it to the official receiver<sup>2</sup>. From then on, all proofs of debt must be sent to the trustee and retained by him<sup>3</sup>.

Where the trustee ceases to be in office as such, in consequence of removal, resignation or cesser of qualification as an insolvency practitioner, he is under obligation forthwith to deliver up to the person succeeding him as trustee (inter alia) proofs of debt; and, when the administration of the bankrupt's estate is for practical purposes complete, the trustee must forthwith file in court<sup>4</sup> all proofs remaining with him in the proceedings<sup>5</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.103(1).

2 Ibid r 6.103(2).

3 Ibid r 6.103(3).

4 For the meaning of 'file in court' see para 95 note 10 ante.

5 See the Insolvency Rules 1986, SI 1986/1925, r 6.146; and para 374 ante.

## UPDATE

### 490-572 Proof of debts

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 535 Transmission of proofs to trustee

TEXT AND NOTES--See SI 1986/1925 r 6.103A (new trustee appointed) (added by SI 2010/686).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/536. Admission and rejection of proofs for dividend.

### 536. Admission and rejection of proofs for dividend.

A proof may be admitted for dividend either for the whole amount claimed by the creditor, or for part of that amount<sup>1</sup>. If the trustee rejects a proof in whole or in part, he must prepare a written statement of his reasons for doing so, and send it forthwith to the creditor<sup>2</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.104(1).

2 Ibid r 6.104(2). Under the provisions of the Bankruptcy Act 1914 s 32, Sch 2 r 23 (repealed) the trustee had to examine every proof lodged with him and the grounds of the debt, even though the proof was based on a judgment, a covenant or an account stated: *Re Van Laun, ex p Chatterton* [1907] 2 KB 23, CA; *Re Lupkovichs*,

*ex p Trustee v Freville* [1954] 2 All ER 125, [1954] 1 WLR 1234; and see para 494 note 4 ante. As to appeals against the trustee's decision on proof see para 537 post.

## UPDATE

### 490-572 Proof of debts

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/537. Appeal against decision on proof.

### 537. Appeal against decision on proof.

If a creditor is dissatisfied with the trustee's decision with respect to his proof, including any decision on the question of preference<sup>1</sup>, he may apply to the court for the decision to be reversed or varied; and the application<sup>2</sup> must be made within 21 days of his receiving the statement of reasons for rejecting the proof<sup>3</sup>. The bankrupt or any other creditor may, if dissatisfied with the trustee's decision admitting or rejecting the whole or any part of a proof, make such an application within 21 days of becoming aware of the trustee's decision<sup>4</sup>.

Where any such application is made to the court, the court must fix a venue<sup>5</sup> for the application to be heard, notice of which must be sent by the applicant to the creditor who lodged the proof in question, if it is not himself, and to the trustee<sup>6</sup>. The trustee must, on receipt of the notice, file in court<sup>7</sup> the relevant proof, together, if appropriate, with a copy of the statement of reasons rejecting the proof<sup>8</sup>. After the application has been heard and determined, the proof must, unless it has been wholly disallowed, be returned by the court to the trustee<sup>9</sup>. The official receiver is not personally liable for costs incurred by any person in respect of any such application; and the trustee, if other than the official receiver, is not so liable, unless the court makes an order to that effect<sup>10</sup>.

1 As to preferential creditors see para 577 et seq post.

2 As to the mode of application and the procedure see para 764 et seq post.

3 Insolvency Rules 1986, SI 1986/1925, r 6.105(1). As to the requirement that the trustee send a statement of reasons for rejecting the proof see r 6.104(2); and para 536 ante.

4 Ibid r 6.105(2).

5 For the meaning of 'venue' see para 84 note 21 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 6.105(3).

7 For the meaning of 'file in court' see para 95 note 10 ante.

8 Insolvency Rules 1986, SI 1986/1925, r 6.105(4). The court will decide on the merits on the evidence before it; its function is not that of deciding merely whether the rejection was right or wrong on the evidence available to the trustee: *Re Kentwood Construction Ltd* [1960] 2 All ER 655n, [1960] 1 WLR 646; *Re Trepca Mines Ltd* [1960] 3 All ER 304n, [1960] 1 WLR 1273, CA (company cases).

9 Insolvency Rules 1986, SI 1986/1925, r 6.105(5).

10 Ibid r 6.105(6).

## **UPDATE**

### **490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/538. Withdrawal or variation of proof.

### **538. Withdrawal or variation of proof.**

A creditor's proof may at any time, by agreement between himself and the trustee, be withdrawn or varied as to the amount claimed<sup>1</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 6.106. As to appeals against the trustee's decision on proof see para 537 ante. See also the Insolvency Act 1986 s 303(1); and para 344 ante.

## **UPDATE**

### **490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(ii) Procedure for Proving/539. Expunging of proof by the court.

### **539. Expunging of proof by the court.**

The court may expunge a proof or reduce the amount claimed:

- 697 (1) on the trustee's application<sup>1</sup>, where he thinks that the proof has been improperly admitted, or ought to be reduced; or
- 698 (2) on the application<sup>1</sup> of a creditor, if the trustee declines to interfere in the matter<sup>2</sup>.

Where any such application is made to the court, the court must fix a venue<sup>3</sup> for the application to be heard, notice of which must be sent by the applicant:

- 699 (a) in the case of an application by the trustee, to the creditor who made the proof; and

700 (b) in the case of an application by a creditor, to the trustee and to the creditor who made the proof, if not himself<sup>4</sup>.

Mere lapse of time does not bar the court's right to expunge or reduce a proof<sup>5</sup>. If a proof is expunged or reduced, a creditor may retain any dividend previously received<sup>5</sup>; but he is not entitled to receive any further dividend without giving credit for the overpayment in respect of his original proof<sup>6</sup>.

The proof of a limited company, which is dissolved after the company has proved, should not be expunged; but the dividends after dissolution devolve on the Crown as bona vacantia<sup>7</sup>, unless, it would seem, at the time of the dissolution there were unsatisfied debenture holders<sup>8</sup>.

1 As to the mode of application and the procedure see para 764 et seq post.

2 Insolvency Rules 1986, SI 1986/1925, r 6.107(1).

3 For the meaning of 'venue' see para 84 note 21 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.107(2).

5 *Re Tait, ex p Harper* (1882) 21 ChD 537, CA. No time limit is prescribed by the Insolvency Rules 1986, SI 1986/1925 (as amended).

6 *Re Searle, Hoare & Co* [1924] 2 Ch 325; and see *Re Pilling, ex p Ogle, ex p Smith* (1873) 8 Ch App 711; *Re Browne (a bankrupt), ex p Official Receiver v Thompson* [1960] 2 All ER 625, [1960] 1 WLR 692.

7 *Re Higginson and Dean, ex p A-G* [1899] 1 QB 325. The opinion expressed in the judgment given in this case at 332, relating to the necessity for a trust in order to enable the Crown to recover property as bona vacantia, was disapproved in *Re Wells, Swinburne-Hanham v Howard* [1933] Ch 29, CA.

8 *Gough's Garages Ltd v Pugsley* [1930] 1 KB 615.

## UPDATE

### 490-572 Proof of debts

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(12) PROOF OF DEBTS/(iii) Quantification of Claim/540. Estimate of quantum.

## (iii) Quantification of Claim

### 540. Estimate of quantum.

The function of the trustee is to get in, realise and distribute the bankrupt's estate<sup>1</sup>; and, for this purpose, he must consider the proofs submitted and either admit or reject each proof in whole or in part<sup>2</sup>. The trustee must estimate the value of any bankruptcy debt which, by reason of its being subject to any contingency or contingencies or for any other reason, does not bear a certain value<sup>3</sup>. Where the value of a bankruptcy debt is so estimated by the trustee, or by the

court<sup>4</sup>, the amount provable in the bankruptcy in respect of the debt is the amount of the estimate<sup>5</sup>.

1 See the Insolvency Act 1986 s 305(2); and para 456 ante.

2 See the Insolvency Rules 1986, SI 1986/1925, r 6.104; and para 536 ante.

3 Insolvency Act 1986 s 322(3); and see para 493 ante. In quantifying a claim which is contingent as at the date of the bankruptcy order, events which have occurred between that date and the date it becomes necessary to value the claim will be taken into account: *Stein v Blake* [1996] AC 243 at 252, [1995] 2 All ER 961 at 964, 965, HL. As to the application of the Insolvency Act 1986 s 322 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 491 note 1 ante.

4 See under *ibid* s 303 (as amended); see para 344 ante.

5 *Ibid* s 322(4).

## UPDATE

### 490-572 Proof of debts

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#### 541. Secured creditors.

Particulars of any security held, the date when it was given and the value which the creditor puts on it must be stated in a creditor's proof of debt<sup>1</sup>.

A secured creditor<sup>2</sup> may, with the agreement of the trustee or the permission of the court, at any time alter the value which he has, in his proof of debt, put on his security<sup>3</sup>. If, however, a secured creditor, being the petitioner, has in the petition put a value on his security, or has voted in respect of the unsecured balance of his debt, he may revalue his security only with the permission of the court<sup>4</sup>. If the trustee is dissatisfied with the value which a secured creditor puts on his security, he may require any property comprised in the security to be offered for sale<sup>5</sup>. The trustee may at any time give notice to a creditor whose debt is secured that he proposes, at the expiration of 28 days from the date of the notice, to redeem the security at the value put on it in the creditor's proof<sup>6</sup>. The creditor then has 21 days, or such longer period as the trustee may allow, in which, if he so wishes, to exercise his right to revalue his security; and, if the creditor so revalues his security, the trustee may only redeem at the new value<sup>7</sup>. If the trustee redeems the security, the cost of transferring it is borne by the estate<sup>8</sup>. If a creditor who has valued his security subsequently realises it, whether or not at the instance of the trustee, the net amount realised is to be substituted for the value previously put by the creditor on the security, and that amount is to be treated in all respects as an amended valuation made by him<sup>9</sup>.

1 See the Insolvency Rules 1986, SI 1986/1925, r 6.98(1)(g); and para 530 head (7) ante.



- 2 For the meaning of 'secured creditor' see para 560 post.
- 3 Insolvency Rules 1986, SI 1986/1925, r 6.115(1).
- 4 Ibid r 6.115(2).
- 5 See ibid r 6.118; and para 565 post.
- 6 See ibid r 6.117(1); and para 564 post.
- 7 See ibid r 6.117(2); and para 564 post.
- 8 See ibid r 6.117(3); and para 564 post.
- 9 See ibid r 6.119; and para 566 post.

## **UPDATE**

### **490-572 Proof of debts**

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### **542. Trade and other discounts.**

There must in every case be deducted from the claim all trade and other discounts which would have been available to the bankrupt but for his bankruptcy, except any discount for immediate, early or cash settlement<sup>1</sup>.

- 1 Insolvency Rules 1986, SI 1986/1925, r 6.110.

## **UPDATE**

### **490-572 Proof of debts**

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### **543. Debt in foreign currency.**

For the purpose of proving a debt incurred or payable in a currency other than sterling, the amount of the debt must be converted into sterling at the official exchange rate<sup>1</sup> prevailing on the date of the bankruptcy order<sup>2</sup>.

1 For these purposes, 'the official exchange rate' is the middle market rate at the Bank of England, as published for the date in question; and, in the absence of any such published rate, it is such rate as the court determines: Insolvency Rules 1986, SI 1986/1925, r 6.111(2).

2 Ibid r 6.111(1). Where the creditor is proving in respect of a claim for damages in tort in a foreign currency (see *Eleftherotria (Owners) v Despina R (Owners)*, *The Despina R* [1979] AC 685, [1979] 1 All ER 421, HL), the bankrupt is deemed to become subject to such liability by reason of an obligation incurred at the time the cause of action accrued: see the Insolvency Act 1986 s 382(2); and para 491 ante.

## **UPDATE**

### **490-572 Proof of debts**

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### **543 Debt in foreign currency**

NOTE 1--SI 1986/1925 r 6.111(2) amended: SI 2003/1730.

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### **544. Payments of a periodical nature.**

In the case of rent and other payments of a periodical nature, the creditor may prove for any amounts due and unpaid up to the date of the bankruptcy order<sup>1</sup>. Where at that date any payment was accruing due, the creditor may prove for so much as would have fallen due at that date, if accruing from day to day<sup>2</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.112(1). As to the position with regard to future rent or other payments of a periodical nature not presently due see para 546 post.

2 Ibid r 6.112(2). As to liability for rent of a trustee who does not disclaim a lease see paras 411, 480 ante; and as to distress for rent see para 686 et seq post.

## **UPDATE**

### **490-572 Proof of debts**

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#### **545. Proof for interest.**

Where a bankruptcy debt bears interest, that interest is provable as part of the debt, except in so far as it is payable in respect of any period after the commencement of the bankruptcy<sup>1</sup>.

In the following circumstances the creditor's claim may include interest on the debt at the prescribed rate<sup>2</sup> for periods before the bankruptcy order, although not previously reserved or agreed<sup>3</sup>. If the debt is due by virtue of a written instrument, and payable at a certain time, interest may be claimed for the period from that time to the date of the bankruptcy order<sup>4</sup>. If the debt is due otherwise, interest may only be claimed if, before the presentation of the bankruptcy petition, a demand for payment was made in writing by or on behalf of the creditor, and notice given that interest would be payable from the date of the demand to the date of payment<sup>5</sup>. In that case, interest may only be claimed for the period from the date of the demand to that of the bankruptcy order<sup>6</sup>; and, for all the purposes of the Insolvency Act 1986 and the Insolvency Rules 1986, interest is chargeable at a rate not exceeding the prescribed rate<sup>7</sup>.

1 Insolvency Act 1986 s 322(2). As to the payment of interest on debts proved in the bankruptcy see para 585 post; and as to the commencement of bankruptcy see para 213 ante.

2 The rate of interest to be claimed is the rate specified in the Judgments Act 1838 s 17 (as amended) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1307) on the date of the bankruptcy order: Insolvency Rules 1986, SI 1986/1925, r 6.113(5) (substituted by SI 1987/1919).

3 Insolvency Rules 1986, SI 1986/1925, r 6.113(1).

4 Ibid r 6.113(2).

5 Ibid r 6.113(3) (amended by SI 1987/1919).

6 Insolvency Rules 1986, SI 1986/1925, r 6.113(4) (substituted by SI 1987/1919).

7 Insolvency Rules 1986, SI 1986/1925, r 6.113(3) (amended by SI 1987/1919).

### **UPDATE**

#### **490-572 Proof of debts**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **546. Debt payable at future time.**

A creditor may prove for a debt of which payment was not yet due at the date of the bankruptcy order, but subject to the provisions<sup>1</sup> for the adjustment of dividends where payment is made before time<sup>2</sup>.

1    le subject to the Insolvency Rules 1986, SI 1986/1925, r 11.13: see para 602 post.

2    Ibid r 6.114.

## **UPDATE**

### **490-572 Proof of debts**

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## **(iv) Mutual Credit and Set-off**

### **547. Right of set-off.**

Where before the commencement of the bankruptcy<sup>1</sup> there have been mutual credits<sup>2</sup>, mutual debts<sup>3</sup> or other mutual dealings<sup>4</sup> between the bankrupt and any creditor of the bankrupt proving or claiming to prove for a bankruptcy debt<sup>5</sup>, an account must be taken of what is due from each party to the other in respect of mutual dealings and the sums due from one party must be set off against the sums due from the other<sup>6</sup>. Only the balance, if any, of the account so taken is provable as a bankruptcy debt or, as the case may be, is to be paid to the trustee as part of the bankrupt's estate<sup>7</sup>. The claims on each side must be such as to result in pecuniary liabilities in respect of which the account may be taken<sup>8</sup>. The right is subject to the rule against double proof, and is not available in favour of a surety when the principal creditor's right of proof in respect of the debt guaranteed is still subsisting<sup>9</sup>.

As a result of the operation of set-off, mutual claims only remain in existence for the purpose of ascertaining a balance of account between them. The trustee in bankruptcy may, therefore, only validly assign any net balance owing to the insolvent estate on the taking of the account<sup>10</sup>.

1    As to the commencement of bankruptcy see para 213 ante.

2    'Mutual credits' arise when one or both parties to the transaction allow the other to pay the sums he owes at a future date or on the happening of an agreed event or contingency: *Re Prescott, ex p Prescott* (1753) 1 Atk 230; *Young v Bank of Bengal* (1836) 1 Moo PCC 150. Each credit must, however, be of such a nature that it will eventually become a debt, not eg a mere deposit of property: *Rose v Hart* (1818) 8 Taunt 499; *Rose v Sims* (1830) 1 B & Ad 521.

3    'Mutual debts' arise where the bankrupt and the other party each owe the other a liquidated sum payable immediately or in the future: see eg *Clark v Cort* (1840) Cr & Ph 154.

4    'Mutual dealings' is capable of wide interpretation and covers most transactions between the bankrupt and the other party which may give rise to rights or liabilities between them: see *Re Charge Card Services Ltd* [1987] Ch 150, [1986] 3 All ER 289 (affd [1989] Ch 497, [1988] 3 All ER 702, CA); and para 548 et seq post.

5 For the meaning of 'bankruptcy debt' see para 491 ante. The right may be claimed by a person who is sued by the trustee in respect of a debt due to the estate: see *Peat v Jones & Co* (1881) 8 QBD 147, CA; *Jack v Kipping* (1882) 9 QBD 113, DC; *Re City Equitable Fire Insurance Co (No 2)* [1930] 2 Ch 293, CA.

6 Insolvency Act 1986 s 323(1), (2). Sums due from the bankrupt to another party may not be included in the account taken under s 323(2) if that other party had notice at the time they became due that a bankruptcy petition relating to the bankrupt was pending: s 323(3). The words 'at the time they became due' in s 323(3) refer to the time at which the obligation was created and not the time when payment should be made under that obligation: *Coe v Ashurst* [1999] BPIR 662.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 323 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

7 Insolvency Act 1986 s 323(4).

8 *Rose v Hart* (1818) 8 Taunt 499; *Naoroji v Chartered Bank of India* (1868) LR 3 CP 444; *Eberle's Hotels and Restaurant Co Ltd v Jonas* (1887) 18 QBD 459, CA (claim in detinue for the return of specific goods deposited to secure a debt not mutual dealings); *Palmer v Day & Sons* [1895] 2 QB 618. It is not necessary that the pecuniary claims in question arise out of contract: *Re DH Curtis (Builders) Ltd* [1978] Ch 162, [1978] 2 All ER 183; *Re Cushla Ltd* [1979] 3 All ER 415, [1979] STC 615.

9 See para 506 ante; *Re Fenton, ex p Fenton Textile Association* [1931] 1 Ch 85 at 112, CA; *Re A Debtor (No 66 of 1955), ex p Debtor v Trustee of Property of Waite (a bankrupt)* [1956] 2 All ER 94, [1956] 1 WLR 480 (affd [1956] 3 All ER 225, [1956] 1 WLR 1226, CA); *Re Glen Express Ltd* [2000] BPIR 456; and see para 551 post.

10 *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL (set-off estimated without the need for a proof to be lodged).

## UPDATE

### 490-572 Proof of debts

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### 548. Application of set-off provisions mandatory.

The right of set-off, and the obligation to set off<sup>1</sup>, being prescribed by the Insolvency Act 1986 for the purposes of the administration of the bankrupt's property<sup>2</sup>, cannot be excluded by the terms of any contract between the bankrupt and the other party, in their application to any transaction falling within the ambit of the 1986 Act<sup>3</sup>. A creditor and debtor may, however, agree to the contractual subordination of indebtedness between them, to take effect on the debtor's insolvency<sup>4</sup>. The set-off provisions in insolvency prevail over those of foreign jurisdictions<sup>5</sup>.

1 See para 547 ante.

2 The object of the mutual credit and set-off provisions is to do substantial justice between the parties where a debt is really due from the bankrupt to the debtor to his estate: *Forster v Wilson* (1843) 12 M & W 191 at 203, 204 per Parke B. The effect of the provisions is to enable the creditor of the bankrupt who is also the bankrupt's debtor to recover his claim in full to the extent of the debt he owes to the bankrupt.

3 *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL (set-off as between separate bank accounts), applying *Rolls Razor Ltd v Cox* [1967] 1 QB 552, [1967] 1 All ER 397, CA; in the first-cited case, earlier dicta on the point, such as in *Re Vaughan, ex p Fletcher* (1877) 6 ChD 350 at 356, CA; *British Guiana Bank v Official Receiver* (1911) 104 LT 754 at 755, PC; *Victoria Products Ltd v Tosh & Co Ltd* (1940) 165 LT 78, and *Re EJ Morel (1934) Ltd* [1962] Ch 21, [1962] 1 All ER 796, were discussed. See also *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL.

4 *Re Maxwell Communications Corpn plc (No 2)* [1994] 1 All ER 737, sub nom *Re Maxwell Communications Corpn plc* [1993] 1 WLR 1402.

5 *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, [1996] 4 All ER 796.

## UPDATE

### 490-572 Proof of debts

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### 549. Where right of set-off available.

Sums due from the bankrupt to another party may not be included in the account taken<sup>1</sup> if that other party had notice at the time they became due that a bankruptcy petition relating to the bankrupt was pending<sup>2</sup>. The benefit<sup>3</sup> of the statutory right of set-off<sup>4</sup> is, therefore, not allowed to any person to the extent that he gave credit to the debtor with knowledge that a bankruptcy petition had been presented, nor is the right available to a creditor who has given an undertaking not to prove<sup>5</sup>.

Where the creditor enters into a transaction with the debtor without notice of the petition and there is a liability of the bankrupt at the date of his being made bankrupt, it is immaterial that the actual amount of the debt is not ascertained until afterwards<sup>6</sup>.

This right of set-off takes its origin from the fact that bankruptcy jurisdiction is an equitable jurisdiction<sup>7</sup>, and, therefore, as the court proceeds on equitable principles, an equitable debt may be set off against a legal debt<sup>8</sup>.

A right of set-off may exist not only where two debts are due, but also where one debt will not become due until a future date, and where the claim on one side is for unliquidated damages, provided, in cases where the claim for unliquidated damages is in the hands of the creditor not the bankrupt, that it is provable in the bankruptcy<sup>9</sup>. It is not essential for the right of set-off to apply that the mutual debts, mutual credits or mutual dealings involved arise out of contract<sup>10</sup>. They must, however, be capable of forming the subject matter of an account<sup>11</sup>. There can, therefore, be no right of set-off where the claim on the one side is for the specific return of goods<sup>12</sup> or in respect of money or goods deposited for a specific purpose which has not been carried out<sup>13</sup>, or of a balance of such money remaining when it has been carried out<sup>14</sup>. However, the right exists where there is a debt on one side and a delivery of property with directions to turn it into money on the other<sup>15</sup>.

A right of set-off may not be introduced by contract between the parties where there is no mutuality<sup>16</sup>.

1 le under the Insolvency Act 1986 s 323(2): see para 547 ante.

2 Ibid s 323(3). The exception in s 323(3) does not extend to a debt arising under a contract entered into before the presentation of a bankruptcy petition: *Coe v Ashurst* [1999] BPIR 662. As to the application of the Insolvency Act 1986 s 323 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 547 note 6 ante.

3 See para 548 note 2 ante.

4 See para 547 ante.

5 *Kitchen's Trustee v Madders and Madders* [1950] Ch 134, [1949] 2 All ER 1079, CA; explained in *Bradley-Hole v Cusen* [1953] 1 QB 300, [1953] 2 WLR 193, sub nom *Hole v Cuzen* [1953] 1 All ER 87, CA.

6 *Re Asphaltic Wood Pavement Co, Lee and Chapman's Case* (1885) 30 ChD 216, CA; *Re Daintrey, ex p Mant* [1900] 1 QB 546, CA; *Sovereign Life Assurance Co v Dodd* [1892] 1 QB 405 (affd [1892] 2 QB 573, CA); *Re City Life Assurance Co Ltd, Grandfield's Case, Stephenson's Case* [1926] Ch 191, CA. In the last-cited case, it was stated that *Re Lankester, ex p Price* (1875) 10 Ch App 648 was inconsistent with the first-cited case, and, having regard also to subsequent changes in the statute law, was not to be treated as binding. See also *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL. The result of the authorities is that it is not necessary that there should be mutual debts existing at the date of the bankruptcy order; it is sufficient if there are contractual obligations the breach of which may give rise to a claim for damages provable in the bankruptcy. These principles are applicable to the claim of a mortgagor policy-holder, and the actuarial value of his policy may be set off against the mortgage debt (*Re National Benefit Assurance Co Ltd* [1924] 2 Ch 339; *Re City Life Assurance Co Ltd, Grandfield's Case, Stephenson's Case* supra), unless the insurance company, though without notice to the mortgagor, has equitably assigned the mortgage, in which case there is no longer a mutual debt: *Re City Life Assurance Co Ltd, Grandfield's Case, Stephenson's Case* supra. See also *Elgood v Harris* [1896] 2 QB 491; *Re Rushforth, ex p Holmes & Sons* (1906) 95 LT 807; *Re HE Thorne & Son Ltd* [1914] 2 Ch 438; and **COMPANIES**.

7 *Lister v Hooson* [1908] 1 KB 174 at 178, CA. For cases where equitable rights have been recognised in set-off see para 553 note 1 post.

8 *Mathieson's Trustee v Burrup, Mathieson & Co* [1927] 1 Ch 562.

9 See *Re Prescott, ex p Prescott* (1753) 1 Atk 230; *Booth v Hutchinson* (1872) LR 15 Eq 30; *Peat v Jones & Co* (1881) 8 QBD 147, CA; *Jack v Kipping* (1882) 9 QBD 113, DC; *Re Mid-Kent Fruit Factory* [1896] 1 Ch 567; *Re Daintrey, ex p Mant* [1900] 1 QB 546, CA; *Re Rushforth, ex p Holmes & Sons* (1906) 95 LT 807; *Tilley v Bowman Ltd* [1910] 1 KB 745 (where a vendor was held entitled to set off damages caused by the bankrupt (ie a sum paid to a pawnbroker to redeem certain goods) against an amount paid on account of the purchase price); and see *Rolls Razor Ltd v Cox* [1967] 1 QB 552, [1967] 1 All ER 397, CA. As to debts provable in the bankruptcy see para 491 ante.

10 *Re DH Curtis (Builders) Ltd* [1978] Ch 162 at 170, [1978] 2 All ER 183 at 188 (where, after an extensive analysis of the authorities, Brightman J expressed the conviction that the dictum of Vaughan Williams J in *Re Mid-Kent Fruit Factory Ltd* [1896] 1 Ch 567 at 570 that the set-off provisions encompassed 'claims as well in respect of debts as of damages liquidated or unliquidated provided they arise out of contract' was wrong). *Re DH Curtis (Builders) Ltd* supra was followed in *Re Cushla Ltd* [1979] 3 All ER 415, [1979] STC 615.

11 le for the purposes of the Insolvency Act 1986 s 323(2); and see para 547 text and note 8 ante; and the cases cited infra.

12 *Re Robinson, ex p Flint* (1818) 1 Swan 30; *Key v Flint* (1817) 8 Taunt 21; *Rose v Hart* (1818) 8 Taunt 499; *Re Winter, ex p Bolland* (1878) 8 ChD 225; *Eberle's Hotels and Restaurant Co Ltd v Jonas* (1887) 18 QBD 459, CA; *Lord's Trustee v Great Eastern Rly Co* [1908] 2 KB 54, CA (on appeal on another point sub nom *Great Eastern Rly Co v Lord's Trustee* [1909] AC 109, HL); *Ellis & Co's Trustee v Dixon-Johnson* [1925] AC 489, HL; *Rolls Razor Ltd v Cox* [1967] 1 QB 552, [1967] 1 All ER 397, CA; and see *Handley Page Ltd v Customs and Excise Comrs and Rockwell Machine Tool Co Ltd* [1970] 2 Lloyd's Rep 459; affd [1971] 2 Lloyd's Rep 298, CA.

13 *Buchanan v Findlay* (1829) 9 B & C 738; *Re Pollitt, ex p Minor* [1893] 1 QB 455, CA; *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL (where, at 808, 812 and at 651, 663, the cases on 'special purpose' are discussed; money is paid for a special or specific purpose so as to exclude mutuality of dealing within the Insolvency Act 1986 s 323 if the money is paid in such circumstances that it would be a misappropriation to use it for any other purpose than that for which it is paid).

14 *Re Mid-Kent Fruit Factory Ltd* [1896] 1 Ch 567; *Re City Equitable Fire Insurance Co (No 2)* [1930] 2 Ch 293, CA.

15 *Naoroji v Chartered Bank of India* (1868) LR 3 CP 444; *Astley v Gurney* (1869) LR 4 CP 714; *Palmer v Day & Sons* [1895] 2 QB 618, CA; *Rolls Razor Ltd v Cox* [1967] 1 QB 552, [1967] 1 All ER 397, CA.

16 *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214, [1997] 4 All ER 568, HL.

## UPDATE

### 490-572 Proof of debts

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### 549 Where right of set-off available

NOTE 8--There is no right of set-off against the equity of exoneration: *Bateman v Williams* [2009] EWHC 1760 (Ch), [2009] BPIR 973, [2009] All ER (D) 317 (Jul).

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### 550. Secured debts.

A right of set-off may exist, even though one of the debts is secured<sup>1</sup>, and even though the parties did not originally intend to have mutual dealings, as where a person has received, before the date of the bankruptcy order, and without notice of a bankruptcy petition presented against the bankrupt, a bill of exchange on which the bankrupt is liable<sup>2</sup>, and, it would seem, even though proof of a debt is postponed by law<sup>3</sup>. Where, however, a creditor is secured for his debt and does not prove in the bankruptcy, a debt due from him to the insolvent estate cannot be set-off against that secured debt<sup>4</sup>.

1 *Re Deveze, ex p Barnett* (1874) 9 Ch App 293; and see *McKinnon v Armstrong Bros & Co* (1877) 2 App Cas 531, HL.

2 *Alsager v Currie* (1844) 12 M & W 571. See also *Hankey v Smith* (1789) 3 Term Rep 507n; *Collins v Jones* (1830) 10 B & C 777; *Baker v Lloyds Bank Ltd* [1920] 2 KB 322.

3 *Re Lonergan, ex p Sheil* (1877) 4 ChD 789, CA.

4 *Re Norman Holding Co Ltd* [1990] 3 All ER 757, [1991] 1 WLR 10.

## UPDATE

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### **551. Rights determined at date of bankruptcy order.**

The mutual credits, mutual debts or other mutual dealings between the bankrupt and any creditor of the bankrupt proving or claiming to prove for a bankruptcy debt must have arisen before the commencement of the bankruptcy<sup>1</sup>, even though by their nature they give rise to a future debt or obligation which may be so proved. A right of set-off not existing at the date of the bankruptcy order cannot generally be acquired afterwards<sup>2</sup>.

A surety who, after the bankruptcy order, pays off the debt and takes over from the principal creditor his securities, including a bill of exchange on which the bankrupt is liable, may set off the amount of the bill against a debt due by himself to the estate<sup>3</sup>; and so, it seems, may a person who, since the date of the bankruptcy order, has been compelled to take up an acceptance of the bankrupt<sup>4</sup>, but a surety who has not paid off the debt cannot set off his contingent liability as surety against sums due by him to the bankrupt<sup>5</sup>.

1 See the Insolvency Act 1986 s 323(1); and para 547 ante. As to the commencement of bankruptcy see para 213 ante.

2 *Dickson v Evans* (1794) 6 Term Rep 57; *Re Milan Tramways Co, ex p Theys* (1884) 25 ChD 587, CA.

3 *Re Moseley Green Coal and Coke Co, Barrett's Case* (1865) 5 New Rep 496, distinguished in *Re A Debtor (No 66 of 1955), ex p Debtor v Trustee of the Property of Waite (a bankrupt)* [1956] 3 All ER 225, [1956] 1 WLR 1226, CA (cited in note 5 infra).

4 Cf *Bolland v Nash* (1828) 8 B & C 105; *Collins v Jones* (1830) 10 B & C 777; *McKinnon v Armstrong Bros & Co* (1877) 2 App Cas 531, HL; and see *Handley Page Ltd v Customs and Excise Comrs and Rockwell Machine Tool Co Ltd* [1970] 2 Lloyd's Rep 459; affd [1971] 2 Lloyd's Rep 298, CA.

5 *Re Fenton, ex p Fenton Textile Association* [1931] 1 Ch 85, CA. In that case both the surety and the principal debtor were insolvent, and the principal creditors proved against the surety on his guarantees but recovered nothing, and it was held that, the principal creditors not having been paid, the trustee of the surety's estate could not set off the surety's liability under the guarantees against a debt due by him to the principal debtor. The trustee of this surety's estate having declared a dividend, it was further held that, as the principal creditors had proved against the principal debtor, the rule against double proof precluded the trustee's claim to retain dividends in respect of the principal debtor's proof, at least so long as any part of the debt due to the principal creditors remained unsatisfied: *Re Fenton (No 2), ex p Fenton Textile Association Ltd* [1932] 1 Ch 178. As to the rule against double proof see para 495 ante.

Where the creditor claims to set off the debt owed to him by the bankrupt against a judgment obtained against him by the bankrupt's trustee, enforcing the bankrupt's right to be indemnified by him against sums paid by the bankrupt as guarantor of debts owed by him, there can be no set-off if the sums paid under the guarantee were paid after the date of the bankruptcy order: see *Re A Debtor (No 66 of 1955), ex p Debtor v Trustee of the Property of Waite (a bankrupt)* [1956] 3 All ER 225, [1956] 1 WLR 1226, CA.

As to the rights of a person induced by fraud to become a surety see para 554 post; and as to the right to indemnity out of the debtor's share in the surety's estate see para 559 post.

## **UPDATE**

### **490-572 Proof of debts**

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## 552. Cases where set-off allowed.

Set-off will be allowed between a debt due to one party and the amount of acceptances given to him by the other which are outstanding in the hands of third parties<sup>1</sup>.

There may be set-off between factors and those who deal with them without any knowledge of principals<sup>2</sup>.

A salesman in possession of money, the proceeds of sale of his employer's goods, or those goods still unsold, is in principle entitled to set off his unpaid commission against that money or those goods<sup>3</sup>.

If a contributory of a company is bankrupt, debts due to him or to an assignee from him before his bankruptcy<sup>4</sup> may be set off against calls<sup>5</sup>; but there is no similar right of set-off in a contributory who is not bankrupt<sup>6</sup>.

A residuary legatee may claim a set-off against the amount misappropriated by him as executor<sup>7</sup>.

It is within the court's discretion to allow a debt due to a creditor to be set off against costs which the creditor has been ordered to pay in respect of a bankruptcy petition against the debtor<sup>8</sup>.

The set-off rules are equally applicable to the administration of a deceased's estate in bankruptcy<sup>9</sup>; and this applies even where the amount due from the insolvent only ripened into a debt after the insolvent's death<sup>10</sup>.

1 *Re Charles, ex p Macredie* (1873) 8 Ch App 535; *Re London, Bombay and Mediterranean Bank, ex p Cama* (1874) 9 Ch App 686. As to cross-accommodation acceptances where both parties are bankrupt see *Ex p Walker* (1798) 4 Ves 373; *Ex p Rawson, ex p Lloyd* (1821) Jac 274; *Re Living, ex p Laforest, ex p Wetherell* (1833) 2 Deac & Ch 199.

2 *Re Henley, ex p Dixon* (1876) 4 ChD 133, CA; cf *Cooke & Sons v Eshelby* (1887) 12 App Cas 271, HL; *Montagu v Forwood* [1893] 2 QB 350, CA.

3 *Rolls Razor Ltd v Cox* [1967] 1 QB 552, [1967] 1 All ER 397, CA.

4 *Re Universal Banking Corpn, ex p Strang* (1870) 5 Ch App 492.

5 *Re Duckworth* (1867) 2 Ch App 578; *Re Anglo-Greek Steam Navigation and Trading Co, Carralli and Haggard's Claim* (1869) 4 Ch App 174. Cf *Re GEB (a debtor)* [1903] 2 KB 340, CA. The grounds on which a bankrupt contributory's debts may be set off against calls for which he is liable do not apply where the contributory is a company in liquidation; eg, if two companies are in liquidation, one indebted to the other for money lent and the other indebted to the first company for calls, there can be no set-off (*Re Auriferous Properties Ltd* [1898] 1 Ch 691), and no dividend can be received on the debts until all calls have been paid up (*Re Auriferous Properties Ltd (No 2)* [1898] 2 Ch 428); and see **COMPANIES**. Cf *Re Peruvian Railway Construction Co Ltd* [1915] 2 Ch 144; affd [1915] 2 Ch 442, CA (claim by executors of insolvent shareholder indebted to company to share in surplus assets on winding up of company).

6 *Re Overend, Gurney & Co, Grissell's Case* (1864) 1 Ch App 528; *Re Hiram Maxim Lamp Co* [1903] 1 Ch 70.

7 *Re Chapman, ex p Parker* (1887) 4 Morr 109, DC. See also *Re Crosthwaite, ex p Turner* (1852) 2 De GM & G 927. Cf *Re Welch, ex p Stone* (1873) 8 Ch App 914.

8 *Re A Debtor (No 21 of 1950) (No 2)*, *ex p Petitioning Creditors v Debtor* [1951] Ch 612, [1951] 1 All ER 600, DC. The decision in this case, applying *Reid v Cupper* [1915] 2 KB 147, CA and *Knight v Knight* [1925] Ch 835, CA, was based on the conclusion that earlier decisions, such as *Re Adams, ex p Griffin* (1880) 14 ChD 37, CA, *Re Bassett, ex p Lewis* [1896] 1 QB 219 and *Re Drummond, ex p Ashmore* [1909] 2 KB 622, are no longer authoritative as regards set-off against costs in bankruptcy proceedings, both by reason of the repeal of the earlier rules, and because the jurisdiction to allow or disallow such a set-off was essentially discretionary, and might be exercised, even where it adversely affected a solicitor's lien. See also *Young v Mead* [1917] 2 IR 258 (cited in *Re A Debtor (No 21 of 1950) (No 2)*, *ex p Petitioning Creditors v Debtor* supra).

9 See para 547 note 6 ante.

10 *Watkins v Lindsay & Co* (1898) 5 Mans 25. As to the right of set-off in an administration in Chancery see *Re Smith, Green v Smith* (1883) 22 ChD 586; *Re Gedney, Smith v Grummitt* [1908] 1 Ch 804.

## UPDATE

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### 553. No set-off where debt assigned.

The provision as to mutual credit applies only as between the bankrupt and a creditor<sup>1</sup>, and, therefore, in general does not apply where the debt due to the bankrupt has been assigned by him before the bankruptcy order<sup>2</sup>.

1 *Turner v Thomas* (1871) LR 6 CP 610. Equitable rights are recognised in set-off: *Forster v Wilson* (1843) 12 M & W 191; *Bailey v Finch* (1871) LR 7 QB 34; *Bailey v Johnson* (1872) LR 7 Exch 263; *Middleton v Pollock, ex p Nugee* (1875) LR 20 Eq 29; *Bankes v Jarvis* [1903] 1 KB 549; and see paras 547, 549 ante. However, an allegation that the party claiming set-off has a beneficial interest in the debt is not enough. Set-off will not be permitted if that party cannot demonstrate his entitlement to a beneficial interest without further inquiry: *Bank of Credit and Commerce International SA (in liquidation) v Al Saud* [1997] 1 BCLC 457, [1997] BCC 63.

2 *De Mattos v Saunders* (1872) LR 7 CP 570; *Re Asphaltic Wood Pavement Co, Lee and Chapman's Case* (1885) 30 ChD 216, CA; *Re City Life Assurance Co Ltd, Grandfield's Case, Stephenson's Case* [1926] Ch 191, CA; cf *Re Pinto Leite & Nephews, ex p Visconde Des Oliveira* [1929] 1 Ch 221. For a case where, in a winding up, a debt acquired by assignment was held not to be available to be set off see *Re Eros Films Ltd* [1963] Ch 565, [1963] 1 All ER 383.

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### **554. Joint and separate debts.**

In the absence of agreement, express or implied<sup>1</sup>, there is no set-off between joint and separate debts<sup>2</sup>; but, if one joint debtor is a surety for the other, the principal debtor may set off against the joint debt a debt due to himself<sup>3</sup>; and a person induced to become surety by the creditor's fraud may set off his claim in respect of the fraud against the debt due by the principal debtor<sup>4</sup>.

1 *Kinnerley v Hossack* (1809) 2 Taunt 170; *Tyso v Pettit* (1879) 40 LT 132.

2 *Ex p Twogood* (1805) 11 Ves 517; *New Quebrada Co v Carr* (1869) LR 4 CP 651. Cf *Slipper v Stidstone* (1794) 5 Term Rep 493; *French v Andrade* (1796) 6 Term Rep 582 (surviving partner).

3 *Ex p Hanson* (1806) 12 Ves 346; *Ex p Hanson* (1811) 18 Ves 232.

4 *Ex p Stephens* (1805) 11 Ves 24; and see *Ex p Hanson* (1806) 12 Ves 346 at 348; *Vulliamy v Noble* (1817) 3 Mer 593 at 621; *Middleton v Pollock, ex p Knight and Raymond* (1875) LR 20 Eq 515 at 519, 521.

## **UPDATE**

### **490-572 Proof of debts**

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### **555. Debts due in different rights.**

In order that debts may be set off, they must be due respectively in the same right<sup>1</sup>; and, therefore, debts due to or from executors personally cannot be set off against debts due from or to them in their capacity as executors<sup>2</sup>, nor may debts due to or from a trustee in bankruptcy personally be set off against debts due from or to the bankrupt<sup>3</sup>. Where a creditor has received money since the bankruptcy which, on its receipt, belongs in equity to the trustee in bankruptcy, he cannot set off against it a debt due to him by the bankrupt<sup>4</sup>.

Where the bankrupt gave funds to his solicitor for the costs of a specific purpose which was not carried out because of his bankruptcy, such funds could not be set off by the solicitor against a debt for costs incurred in other matters<sup>5</sup>. A creditor with a judgment debt against the bankrupt may set off his liability to repay money which he received as a preference<sup>6</sup> and which he has been ordered to repay<sup>7</sup>.

1 See *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785 at 821, 822, [1972] 1 All ER 641 at 663, 664, HL per Lord Kilbrandon; *Lister v Hooson* [1908] 1 KB 174, CA. See also *Re A Debtor, ex p Peak Hill Goldfield Ltd* [1909] 1 KB 430, CA (where the bankrupt held debenture stock in the petitioning creditor company, and it was held that an essential change had been effected by the appointment of

a receiver, so that thenceforward there were no mutual credits between the petitioning creditor and the debtor; *Re Jane, ex p Trustee* (1914) 110 LT 556, CA (where the relation between the bankrupt and joint debtors was severed).

2 *Bishop v Church* (1748) 3 Atk 691. See also *Re Willis Percival & Co, ex p Morier* (1879) 12 ChD 491, CA; *Middleton v Pollock, ex p Nugee* (1875) LR 20 Eq 29; and cf *Bailey v Finch* (1871) LR 7 QB 34.

3 *Lister v Hooson* [1908] 1 KB 174, CA; *Re Kirk, ex p Whitehead* (1821) 1 Gl & J 39; *West v Pryce* (1825) 2 Bing 455; *Groom v Mealey* (1835) 2 Bing NC 138; *Alloway v Steere* (1882) 10 QBD 22 (rent due before bankruptcy and value of tillages payable to trustee who carried on farm); *Kitchen's Trustee v Madders* [1950] Ch 134, [1949] 2 All ER 1079, CA (rent due to trustee, and damages awarded against bankrupt), explained in *Bradley-Hole v Cusen* [1953] 1 QB 300, [1953] 1 All ER 87, CA, and applied in *Re A Debtor (No 66 of 1955), ex p Debtor v Trustee of the Property of Waite (a bankrupt)* [1956] 3 All ER 225, [1956] 1 WLR 1226, CA. Cf *Re Wilson, ex p Lord Hastings* (1893) 10 Morr 219 (custom of the country). See also *Re Morrish, ex p Hart Dyke* (1882) 22 ChD 410, CA.

4 *Elgood v Harris* [1896] 2 QB 491 (salvage received by insurance broker in respect of a loss paid by bankrupt underwriter).

5 *Re Pollitt, ex p Minor* [1893] 1 QB 455, CA; and see *Re British Folding Bed Co, ex p Trustee v NA Woodiwiss & Co* [1948] Ch 635, [1948] 2 All ER 216.

6 As to preferences see para 656 et seq post.

7 *Re A Debtor (No 82 of 1926)* [1927] 1 Ch 410.

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### 556. Set-off by or against the Crown.

There is mutuality between the bankrupt and all departments of the Crown; accordingly one Crown department may set off against a debt owed by it to the bankrupt a debt owed by him to another Crown department<sup>1</sup>.

1 *Re DH Curtis (Builders) Ltd* [1978] Ch 162, [1978] 2 All ER 183; *Re Cushla Ltd* [1979] 3 All ER 415, [1979] STC 615; *Re Unit 2 Windows Ltd* [1985] 3 All ER 415, [1985] 1 WLR 1383 (company cases); *R v Secretary of State for Social Security, ex p Taylor and Chapman* [1997] BPIR 505; *Mulvey v Secretary of State for Social Security* [1997] BPIR 696, HL. However, a fine imposed on the bankrupt for an offence is not a debt provable in bankruptcy (see para 491 ante) and will not come within the set-off provisions of the Insolvency Act 1986 s 323.

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### **557. Set-off of contingent debts.**

Debts which are wholly contingent at the date of the bankruptcy order, being debts provable in bankruptcy, are capable of set-off where they have resulted from mutual dealings<sup>1</sup>.

<sup>1</sup> See *Re Charge Card Services Ltd* [1987] Ch 150, [1986] 3 All ER 289, where Millett J considered the authorities and disapproved the distinction drawn in some texts and in *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155 between a liability the very existence of which is still contingent at the date of the bankruptcy order and a liability which is then certain but the amount of which is unascertainable because its quantum depends on future events. With respect to the former, it was suggested that, unless and until the breach of contract occurred, no damages could arise and hence nothing was due at the date relevant for set-off. *Re Charge Card Services Ltd* supra was affirmed on appeal without this point being expressly considered: see [1988] 3 All ER 702, [1988] 3 WLR 764, CA. See also *Re Bank of Credit and Commerce International (No 8)* [1998] AC 214, [1997] 4 All ER 568, HL.

## **UPDATE**

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### **558. Set-off where preferential and non-preferential debts.**

Where a creditor has both a preferential claim and a non-preferential claim against the bankrupt's estate, and is owed a debt by the bankrupt at the commencement of the bankruptcy<sup>1</sup>, the amount due to the creditor must be set off rateably against the non-preferential debt and the preferential debt, in proportion to the respective amounts of those debts<sup>2</sup>.

<sup>1</sup> As to the commencement of bankruptcy see para 213 ante.

<sup>2</sup> *Re Unit 2 Windows Ltd* [1985] 3 All ER 647, [1985] 1 WLR 1383 (company case). As to preferential debts see para 577 et seq post.

## **UPDATE**

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### 559. Rule in *Cherry v Boulton*.

If a legatee becomes bankrupt after the testator's death and owes money to his estate, the trustee in bankruptcy is in no better position than the legatee<sup>1</sup>. This is not a case of set-off, as there are no mutual debts<sup>2</sup>, nor of retainer<sup>3</sup>; the principle is that a person who owes money which would swell the mass of the deceased's estate is bound to make his contribution to the estate before taking a part share out of it, such as a share of the residuary estate<sup>4</sup>. The principle does not, therefore, prevent a legatee from taking a specific legacy before contributing to the general residuary estate<sup>5</sup>. It extends to the right of a deceased's estate to indemnity in respect of payments made as surety for the legatee<sup>6</sup>.

If, however, the legatee becomes bankrupt before the testator's death, there is no right to withhold the bankrupt's share as beneficiary<sup>7</sup>, except to the extent of any dividend declared or composition payable in the bankruptcy<sup>8</sup>. Where the testator has expressly directed that debts from the legatee should be deducted from his share in the estate, the personal representative should make the deduction, giving credit for any dividend received by the testator in his lifetime<sup>9</sup>.

1 *Bousfield v Lawford* (1863) 1 De GJ & Sm 459; *Re Batchelor, Sloper v Oliver* (1873) LR 16 Eq 481; *Re Watson, Turner v Watson* [1896] 1 Ch 925.

2 *Courtenay v Williams* (1846) 15 LJ Ch 204.

3 *Re Akerman, Akerman v Akerman* [1891] 3 Ch 212 at 219.

4 *Cherry v Boulton* (1839) 4 My & Cr 442 at 448; *Courtenay v Williams* (1846) 15 LJ Ch 204; *Re Akerman, Akerman v Akerman* [1891] 3 Ch 212. See also **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) paras 488, 489.

5 *Re Akerman, Akerman v Akerman* [1891] 3 Ch 212. For a case where a legacy was held not to be specific see *Re Richardson, ex p Thompson v Hutton* (1902) 86 LT 25.

6 *Re Watson, Turner v Watson* [1896] 1 Ch 925; *Re Melton, Milk v Towers* [1918] 1 Ch 37, CA (overruling *Re Binns, Lee v Binns* [1896] 2 Ch 584). The application of the principle is not affected by the rule against double proof (see para 495 ante), and applies even though the creditor may have proved in the bankruptcy of the principal debtor: *Re Melton, Milk v Towers* supra. Where, however, an annuitant creditor proved in the bankruptcy of the legatee who was the principal debtor, and the liability in respect of the annuity was thereby quantified, the surety's personal representatives were entitled to obtain indemnity out of the legatee's interest in the deceased surety's estate to the extent of the creditor's proof, less the dividends paid to the creditor: *Re Lennard, Lennard's Trustee v Lennard* [1934] Ch 235.

7 *Cherry v Boulton* (1839) 4 My & Cr 442; *Re Hodgson, Hodgson v Fox* (1878) 9 ChD 673; *Re Rees, Rees v Rees* (1889) 60 LT 260 (as there is no enforceable debt due from the legatee). See also *Re Pink, Pink v Pink* [1912] 1 Ch 498; affd [1912] 2 Ch 528, CA.

8 *Cherry v Boulton* (1839) 4 My & Cr 442 at 448; *Re Orpen, Beswick v Orpen* (1880) 16 ChD 202; cf *Re Peruvian Railway Construction Co Ltd* [1915] 2 Ch 442, CA.

9 *Re Ainsworth, Millington v Ainsworth* [1922] 1 Ch 22.

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## (v) Secured Creditors

### 560. Meaning of 'secured creditor'.

'Creditor':

701 (1) in relation to a bankrupt, means a person to whom any of the bankruptcy debts<sup>1</sup> is owed; and

702 (2) in relation to an individual to whom a bankruptcy petition relates, means a person who would be a creditor in the bankruptcy if a bankruptcy order were made on that petition<sup>2</sup>.

A debt is secured<sup>3</sup> for the purposes of the Insolvency Act 1986<sup>4</sup> to the extent that the person to whom the debt is owed holds any security<sup>5</sup> for the debt, whether a mortgage, charge, lien or other security, over any property of the person by whom the debt is owed<sup>6</sup>.

1 For the meaning of 'bankruptcy debt' see para 491 ante.

2 Insolvency Act 1986 s 383(1)(a), (b). In the case of an amount falling within s 382(1)(c) (see para 491 head (3) ante), 'person to whom any of the bankruptcy debts is owed' means the person in respect of whom that amount is specified in the criminal bankruptcy order in question: s 383(1)(a). As to the prospective repeal of s 383(1)(a) (in part) see para 844 note 2 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 383 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 32. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

3 I.e. subject to the Insolvency Act 1986 s 383(3), (4) (see *infra*) and any provision of the Insolvency Rules 1986, SI 1986/1925 (as amended) requiring a creditor to give up his security for the purposes of proving a debt (see rr 6.116, 6.117; and paras 563, 564 respectively post). Where a statement such as is mentioned in the Insolvency Act 1986 s 269(1)(a) (see para 152 head (1) ante) has been made by a secured creditor for the purposes of any bankruptcy petition and a bankruptcy order is subsequently made on that petition, the creditor is deemed for the purposes of Pts VIII-XI (ss 252-385) (as amended) to have given up the security specified in the statement: s 383(3).

'Secured' and related expressions are to be construed in accordance with s 383: s 385(1). As to the application of s 385 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 6 note 8 ante.

4 I.e. for the purposes of *ibid* Pts VIII-XI (ss 252-385) (as amended).

5 For these purposes, the reference to a security does not include a lien on books, papers or other records, except to the extent that they consist of documents which give a title to property and are held as such: *ibid* s



383(4). As to a banker's lien see *Re Keever (a bankrupt), ex p Trustee of the Property of the Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631.

6 Insolvency Act 1986 s 383(2).

## UPDATE

### 490-572 Proof of debts

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 561. Proof by secured creditors.

If a secured creditor<sup>1</sup> realises his security, he may prove for the balance of his debt, after deducting the amount realised<sup>2</sup>. He may appropriate the proceeds of realisation as he thinks fit between the claims which are provable and not provable<sup>3</sup>, or between preferential and non-preferential claims in the bankruptcy<sup>3</sup>. The net profit of the realisation may not be applied to interest accrued after the date of the bankruptcy order<sup>4</sup>; but profits made from an unrealised security may be so applied<sup>5</sup>. A creditor who holds several securities in respect of different debts must apply the proceeds of each security to its particular debt, and the surplus funds of one security may not be applied to make good the deficiency of another<sup>6</sup>.

If a secured creditor voluntarily surrenders his security for the general benefit of creditors, he may prove for the whole debt, as if it were unsecured<sup>7</sup>.

1 For the meaning of 'secured creditor' see para 560 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.109(1). As to the position where a creditor values his security for the purposes of proof and subsequently realises his security see para 566 post.

3 *Ex p Hunter* (1801) 6 Ves 94; *Re Fox and Jacobs, ex p Discount Banking Co of England and Wales* [1894] 1 QB 438. See also *Re Foster, ex p Dickin* (1875) LR 20 Eq 767 (where a creditor held security on the property of A for debts owed by both A and the joint estate of A and B; in the subsequent insolvencies the creditor was entitled to apply the proceeds of the realisation of the security between his joint and separate debts in whatever way was most for his advantage and, to enable him to secure this option, he was entitled to apply to the court to have a dividend on the joint estate declared before the declaration of a dividend on the separate estates).

4 *Re Bulmer, ex p Johnson* (1853) 3 De GM & G 218; *Re William Hall (Contractors) Ltd* [1967] 2 All ER 1150, [1967] 1 WLR 948.

5 *Quartermaine's Case* [1892] 1 Ch 639; *Re Savin* (1872) 7 Ch App 760.

6 *Re Newton, ex p Bignold* (1836) 2 Deac 66.

7 Insolvency Rules 1986, SI 1986/1925, r 6.109(2). As to the position of a secured creditor who issues a bankruptcy petition containing a statement that he is willing to give up his security for the benefit of all the bankrupt's creditors see the Insolvency Act 1986 s 269(1)(a); and para 152 head (1) ante. The surrender of the security does not discharge a surety: *Rainbow v Juggins* (1880) 5 QBD 422, CA. The surrender by a first mortgagee of his security puts the trustee in his place, and does not accelerate the rights of subsequent mortgagees: *Cracknall v Janson* (1877) 6 ChD 735. Cf, however, *Moor v Anglo-Italian Bank* (1879) 10 ChD 681 at

690. See also *Bell v Sunderland Building Society* (1883) 24 ChD 618; *Re Pidcock, Penny v Pidcock* (1907) 51 Sol Jo 514.

## UPDATE

### 490-572 Proof of debts

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### 561 Proof by secured creditors

NOTE 7--See also *C & W Berry Ltd v Armstrong-Moakes* [2007] EWHC 2101 (QB), [2007] BPIR 1199.

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### 562. Value of security.

A secured creditor<sup>1</sup> may, with the agreement of the trustee or the permission of the court, at any time alter the value which he has, in his proof of debt, put on his security<sup>2</sup>. If, however, a secured creditor, being the petitioner, has in the petition put a value on his security, or has voted<sup>3</sup> in respect of the unsecured balance of his debt, he may revalue his security only with permission of the court<sup>4</sup>.

1 For the meaning of 'secured creditor' see para 560 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.115(1). Particulars of any security held, the date when it was given and the value which the creditor puts on it must be stated in a creditor's proof of debt: see r 6.98(1)(g); and para 530 head (7) ante.

3 As to voting by a secured creditor see para 288 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.115(2). As to the mode of application and the procedure see para 764 et seq post; and as to dividends payable to a secured creditor who revalues his security see para 599 post.

## UPDATE

### 490-572 Proof of debts

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### 563. Surrender for non-disclosure.

If a secured creditor<sup>1</sup> omits to disclose his security in his proof of debt, he must surrender his security for the general benefit of creditors, unless the court, on application<sup>2</sup> by him, relieves him from the effect of this provision, on the ground that the omission was inadvertent or the result of honest mistake<sup>3</sup>. If the court grants that relief, it may require or allow the creditor's proof of debt to be amended, on such terms as may be just<sup>4</sup>.

1 For the meaning of 'secured creditor' see para 560 ante.

2 As to the mode of application and the procedure see para 764 et seq post.

3 Insolvency Rules 1986, SI 1986/1925, r 6.116(1); and see *Re Henry Lister & Co Ltd* [1892] 2 Ch 417. Inadvertence covers a case where the omission is accidental, but not where the omission was made deliberately and on purpose: *Re Burr, ex p Clarke* (1892) 67 LT 232; *Re Safety Explosives Ltd* [1904] 1 Ch 226, CA; *Re Rowe, ex p West Coast Gold Fields Ltd* [1904] 2 KB 489.

4 Insolvency Rules 1986, SI 1986/1925, r 6.116(2).

## UPDATE

### 490-572 Proof of debts

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### 564. Redemption by trustee.

The trustee may at any time give notice to a creditor whose debt is secured<sup>1</sup> that he proposes, at the expiration of 28 days from the date of the notice, to redeem the security at the value put on it in the creditor's proof<sup>2</sup>. The creditor then has 21 days, or such longer period as the trustee may allow, in which, if he so wishes, to exercise his right to revalue his security, with the permission of the court where this is required<sup>3</sup>; and, if the creditor revalues his security, the trustee may only redeem at the new value<sup>4</sup>. If the trustee redeems the security, the cost of transferring it is borne by the estate<sup>5</sup>.

A secured creditor may at any time, by a notice in writing, call on the trustee to elect whether he will or will not exercise his power to redeem the security at the value then placed on it; and the trustee then has six months in which to exercise the power or determine not to exercise it<sup>6</sup>.

1 For the meaning of 'secured creditor' see para 560 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.117(1).

3 ie where *ibid* r 6.115(2) applies: see para 564 ante.

4 *Ibid* r 6.117(2).

5 Ibid r 6.117(3).

6 Ibid r 6.117(4).

## **UPDATE**

### **490-572 Proof of debts**

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#### **565. Test of security's value.**

If he is dissatisfied with the value which a secured creditor<sup>1</sup> puts on his security, whether in his proof or by way of revaluation<sup>2</sup>, the trustee may require any property comprised in the security to be offered for sale<sup>3</sup>. The terms of sale must be such as may be agreed, or as the court may direct; and, if the sale is by auction, the trustee on behalf of the estate, and the creditor on his own behalf, may appear and bid<sup>4</sup>.

The above provisions do not, however, apply if the security has been revalued and the revaluation has been approved by the court<sup>5</sup>.

1 For the meaning of 'secured creditor' see para 560 ante.

2 Ie under the Insolvency Rules 1986, SI 1986/1925, r 6.117: see para 564 ante.

3 Ibid r 6.118(1).

4 Ibid r 6.118(2).

5 Ibid r 6.118(3).

## **UPDATE**

### **490-572 Proof of debts**

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#### **566. Realisation of security by creditor.**

If a creditor who has valued his security<sup>1</sup> subsequently realises it, whether or not at the instance of the trustee<sup>2</sup>, the net amount realised must be substituted for the value previously put by the creditor on the security, and that amount is to be treated in all respects as an amended valuation made by him<sup>3</sup>.

1 See para 562 et seq ante.

2 See para 565 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.119.

## UPDATE

### 490-572 Proof of debts

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### 567. Partners.

For the purposes of the rules as to proof by secured creditors<sup>1</sup>, the joint estate of partners is to be considered as different from the separate estate of any partner. Therefore, a partnership creditor having a security for his debt on the separate estate of one partner need not value or give up his security<sup>2</sup>, and conversely a creditor of one partner is not obliged to give up or value a security which he holds on the joint estate<sup>3</sup>.

Where, however, A and B deposit a lease, granted to them as tenants in common beneficially, with a bank to secure a loan to A, and A becomes bankrupt, the bank must deduct half the value of the lease, for in this case the security is on A's separate estate, not on the joint estate<sup>4</sup>.

A creditor having a lien on shares standing in the name of one debtor must, in proving against the joint estate of the debtor and his partner, treat the shares as security if in fact they are partnership property<sup>5</sup>.

1 See paras 561-566 ante.

2 *Re Bell, ex p Peacock* (1825) 2 Gl & J 27; *Re Brettell, ex p Bowden* (1832) 1 Deac & Ch 135; *Re Turner, ex p West Riding Union Banking Co* (1881) 19 ChD 105, CA; *Re Hart, ex p Caldicott* (1884) 25 ChD 716, CA; *Re Dutton, Massey & Co, ex p Manchester and Liverpool District Banking Co* [1924] 2 Ch 199, CA. See also the cases cited in note 3 infra.

3 See the cases cited in note 2 supra; and *Re Fraser, Trenholm & Co, ex p English and American Bank* (1868) 4 Ch App 49; *Rolfe and Bank of Australasia v Flower, Salting & Co* (1865) LR 1 PC 27.

4 *Re Turner, ex p West Riding Union Banking Co* (1881) 19 ChD 105, CA, considered in *Re Rushton (a bankrupt), ex p National Westminster Bank Ltd v Official Receiver (Trustee of Bankrupt)* [1972] Ch 197, [1971] 2 All ER 937.

5 *Re Clarke, ex p Connell* (1838) 3 Deac 201; *Re Collie, ex p Manchester and County Bank* (1876) 3 ChD 481, CA; and see *Re Cooksey, ex p Portal & Co* (1900) 83 LT 435.

## UPDATE

### 490-572 Proof of debts

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### 568. Appropriation of securities.

Where property of one partner is held as a security both for his debt and for a debt of his firm, the creditor may realise it and pay himself the partner's debt in full, and then, placing the balance of the security to a suspense account, prove for the whole amount of the joint debt<sup>1</sup>. In such a case he may appropriate his security to the best advantage, and the court would, if necessary, in a proper case order a dividend on the joint estate to be declared before one on the separate estate<sup>2</sup>. On the bankruptcy of a debtor whose debt is guaranteed, the creditor may place the proceeds of any securities given by the guarantor which have been realised, together with any other payments made by the guarantor, on a suspense, or securities realised, account and prove in the debtor's bankruptcy to the full extent of the debt<sup>3</sup>.

1 *Re Walker & Co, ex p Watson* (1880) 42 LT 516.

2 *Re Foster, ex p Dickin* (1875) LR 20 Eq 767.

3 *Re Sass, ex p National Provincial Bank of England Ltd* [1896] 2 QB 12.

## UPDATE

### 490-572 Proof of debts

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### 569. Property in which third party is interested.

Where a security is granted over a property which belongs to the bankrupt and a third party jointly, then, in so far as the bankrupt's interest is a beneficial one, the creditor is secured to

that extent, and he may not prove in the bankruptcy without acknowledging the security<sup>1</sup>. There is no difference between property owned by the bankrupt as tenant in common and property owned by the bankrupt as joint tenant with the third party. Where the property, if given up, would augment the bankrupt's estate, credit must be given for its value as security<sup>2</sup>.

Where a creditor has realised a security granted by a third party on property which was in fact the property of the bankrupt, he must deduct the amount realised before proving<sup>3</sup>. However, where shares, on which a company has a lien for debts of a shareholder, are registered in A's name, but belong in equity to B, the company is not a secured creditor of B for the purpose of either petition or proof in bankruptcy<sup>4</sup>. A creditor who obtains judgment for the purchase price of specific shares is a secured creditor in respect of the judgment debt, because he is entitled to keep the shares until the purchaser, having become the equitable owner, pays the price<sup>5</sup>. Again, where consignors send goods to the debtor for sale, drawing bills on him which they indorse to bankers to whom they send the bills of lading, and the bills are accepted 'payable on the delivery up of the bills of lading', this form of acceptance makes the goods the property of the debtor; the bank must, therefore, in proving against the debtor's estate, treat them as such and prove as secured creditors<sup>6</sup>. If, however, the debtor has absolutely parted with the property before the bankruptcy order, no question of security arises<sup>7</sup>. No credit need be given by a creditor in his proof for a voluntary payment made by a stranger in respect of a loss caused by the bankrupt<sup>8</sup>.

1 *Re Rushton (a bankrupt), ex p National Westminster Bank Ltd v Official Receiver (Trustee of Bankrupt)* [1972] Ch 197, [1971] 2 All ER 937.

2 *Re Turner, ex p West Riding Union Banking Co* (1881) 19 ChD 105, CA; *Re Rushton (a bankrupt), ex p National Westminster Bank Ltd v Official Receiver (Trustee of Bankrupt)* [1972] Ch 197, [1971] 2 All ER 937.

3 *Re Cooksey, ex p Portal & Co* (1900) 83 LT 435 (where the property was the bankrupt's, although represented by him to be his wife's); cf the cases cited in para 567 note 5 ante.

4 *Re Perkins, ex p Mexican Santa Barbara Mining Co* (1890) 24 QBD 613, CA; cf *Bradford Banking Co Ltd v Briggs* (1886) 12 App Cas 29, HL.

5 *Re A Debtor (No 6 of 1941)* [1943] Ch 213, [1943] 1 All ER 553, CA.

6 *Re Howe, ex p Brett* (1871) 6 Ch App 838.

7 *Re Hallett & Co, ex p Cocks, Biddulph & Co* [1894] 2 QB 256, CA (where a promissory note in favour of the debtors, and the guarantee of a third party for its payment, had been handed to the creditors with the intention that they should become their property).

8 *Re Rowe, ex p Derenburg & Co* [1904] 2 KB 483, CA.

## UPDATE

### 490-572 Proof of debts

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### 570. Unauthorised investment of trust fund.

A beneficiary may, if he can, follow trust money into an unauthorised investment, and may also prove for the whole of the missing fund<sup>1</sup>; but it is otherwise if by his conduct he adopts the investment<sup>2</sup>.

1 *Re Biddulph, ex p Biddulph, ex p Barnewall* (1849) 3 De G & Sm 587; *Re Oatway, Hertslet v Oatway* [1903] 2 Ch 356. As to the following of trust money see **EQUITY** vol 16(2) (Reissue) para 861 et seq.

2 *Re Lake, ex p Howe Trustees* [1903] 1 KB 439.

## UPDATE

### 490-572 Proof of debts

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### 571. Negotiable instruments etc.

Unless the trustee allows, a proof in respect of money owed on a bill of exchange, promissory note, cheque or other negotiable instrument or security cannot be admitted unless there is produced the instrument or security itself or a copy of it, certified by the creditor or his authorised representative to be a true copy<sup>1</sup>.

Where bills bearing the debtor's and other names are indorsed by the debtor to a creditor, the test whether they should be valued as securities or not is whether the indorsement was intended to make the debtor liable as indorser of the bills<sup>2</sup>. Thus, proof was allowed to the full amount of bills indorsed to a banker to be discounted<sup>3</sup>, or accepted by the bankrupt although subsequently indorsed and deposited by the party accommodated<sup>4</sup>; but an indorsement to a banker for the purpose of collection does not make the debtor liable as indorser, and, if the banker has a lien, that right is a security<sup>5</sup>.

Generally, where a bill bearing the names of third parties is indorsed and handed to a creditor, he may proceed against all parties to the bill until he receives 100 pence in the pound and interest<sup>6</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.108. Particulars of any security held, the date when it was given and the value which the creditor puts on it must be stated in a creditor's proof of debt: see r 6.98(1)(g); and para 530 head (7) ante.

2 *Re Firth, ex p Schofield* (1879) 12 ChD 337 at 347.

3 *Re Firth, ex p Schofield* (1879) 12 ChD 337 at 345. See also *Ex p Twogood* (1812) 19 Ves 229; *Re Cloughton, ex p Britten* (1833) 3 Deac & Ch 35; *Re Bentley, ex p Brunskill* (1835) 2 Mont & A 220; *Dawson v Isle* [1906] 1 Ch 633.

4 *Re Barker, ex p Phillips* (1840) 1 Mont D & De G 232 (amount receivable in dividend limited).



5 *Clydesdale Bank Ltd v James Allan, Senior & Sons (Liquidators)* 1926 SC 235; *Re Keever (a bankrupt), ex p Trustee of Property of Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631.

6 *Re Fowler, ex p Martin* (1814) 2 Rose 87; *Re Peirson and Sammon, ex p Sammon* (1832) 1 Deac & Ch 564; *Re Caldwell, ex p Reed* (1833) 3 Deac & Ch 481; *Re Bunyard, ex p Newton, ex p Griffin* (1880) 16 ChD 330, CA. Any surplus received by the creditor would belong to the debtor or his trustee: *Re Morris, James v London and County Banking Co* [1899] 1 Ch 485, CA. As to bills of exchange see further para 508 ante.

## UPDATE

### 490-572 Proof of debts

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### 572. Guarantor's equity of exoneration.

Where a debtor and a guarantor both charge their properties to secure the debt, the guarantor's equity of exoneration is to have the debt paid out of the debtor's property before the guarantor's property is appropriated for the debt<sup>1</sup>. Where a father conveyed his property into the joint names of himself and his son to enable the son to obtain a loan and a charge was executed on the property by both father and son as security, on the bankruptcy of the son the father was entitled to insist that the bankrupt's share was used to pay the loan in priority to his share<sup>2</sup>.

1 See *Gee v Liddell* [1913] 2 Ch 62 at 72.

2 *Re A Debtor (No 24 of 1971), ex p Marley v Trustee of Property of Debtor* [1976] 2 All ER 1010, [1976] 1 WLR 952, DC. As to a spouse's equity of exoneration see *Re Pittortou (a Bankrupt), ex p Trustee of Property of Bankrupt v Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58; and para 649 post.

## UPDATE

### 490-572 Proof of debts

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## (13) DISTRIBUTION OF BANKRUPT'S ESTATE

### (i) Priority of Debts

### 573. General order of payment.

The trustee must distribute the assets available for distribution<sup>1</sup> in accordance with the prescribed order of payment<sup>2</sup>. Subject to the statutory provisions<sup>3</sup>, the Crown has no priority in bankruptcy over other unsecured creditors in respect of debts due to the Crown<sup>4</sup>. To be entitled to share in the distribution, the creditor must have proved his debt<sup>5</sup>; and, if he is a secured creditor, he must have complied with the provisions relating to secured creditors<sup>6</sup>. All debts proved in the bankruptcy in the same category of priority rank *pari passu*<sup>7</sup>; and the order of priority for payment is:

- 703 (1) the expenses of the bankruptcy<sup>8</sup>;
- 704 (2) the debts of preferential creditors<sup>9</sup>;
- 705 (3) the debts of ordinary creditors<sup>10</sup>;
- 706 (4) interest arising on the debts<sup>11</sup> of both preferential and ordinary creditors since the commencement of the bankruptcy<sup>12</sup>;
- 707 (5) the debts due to the bankrupt's spouse, and any interest payable in respect of such debts<sup>13</sup>;
- 708 (6) any balance to be returned to the bankrupt<sup>14</sup>.

The statutory provisions<sup>15</sup> relating to priority of debts and debts due to a spouse are without prejudice to any provision of the Insolvency Act 1986<sup>16</sup> or any other Act<sup>17</sup> under which the payment of any debt or the making of any other payment is, in the event of bankruptcy, to have a particular priority or to be postponed<sup>18</sup>.

1 The assets available for distribution in the bankruptcy are those which remain after satisfying the claims of secured creditors, so far as their rights remain unaffected: see para 560 et seq ante.

2 See the Insolvency Act 1986 ss 328, 329; the Insolvency Rules 1986, SI 1986/1925, rr 6.46A (as added), 6.224 (as amended), 10.4, 12.2; and para 574 et seq post.

3 See paras 577-580 post.

4 *Food Controller v Cork* [1923] AC 647, HL.

5 See para 490 et seq ante.

6 See para 560 et seq ante.

7 See the Insolvency Act 1986 s 328(2), (3); and *Farmers' Mart Ltd v Milne* [1915] AC 106, HL (where an agreement by a trustee that, in consideration that certain creditors would consent to his acting as trustee, he would allow part of his remuneration to be applied in securing to those creditors a larger dividend than the other creditors would receive was stated to be a fraud on the bankruptcy laws, the object of which was to secure equal distribution of the bankrupt's assets). See also *Pritchard v Westminster Bank Ltd* [1969] 1 All ER 999, [1969] 1 WLR 547, CA (where the court held that a garnishee order which had the effect of giving the plaintiff preference over all other creditors should not have been made absolute).

8 See para 574 post.

9 See para 577 post.

10 See para 584 post.

11 A distinction is to be drawn between interest arising on a debt prior to the commencement of bankruptcy which, subject to the Insolvency Rules 1986, SI 1986/1925 (as amended), is itself a bankruptcy debt and provable in the bankruptcy (see para 490 et seq ante), and interest on a bankruptcy debt from the commencement of the bankruptcy which is payable at the prescribed rate (see para 585 post), but is postponed to the payment of ordinary debts, whether it is interest payable on preferential or ordinary debts.

12 See para 585 post. As to the commencement of bankruptcy see para 213 ante.

13 See para 586 post.

14 See the Insolvency Act 1986 s 330(5); and para 605 post.

15 See *ibid* ss 328, 329: see para 577 et seq post.

16 See eg *ibid* s 335(6); and para 608 post.

17 See eg the Partnership Act 1890 s 3 (see para 587 post); the Friendly Societies Act 1974 s 59 (see para 588 post); and the Employment Rights Act 1996 Pt XII (ss 182-190) (as amended) (see EMPLOYMENT vol 39 (2009) PARA 556 et seq).

18 Insolvency Act 1986 s 328(6). As to the application of s 328 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 577 note 3 post.

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### 574. Bankruptcy expenses.

The expenses of the bankruptcy rank in priority before preferential and other debts<sup>1</sup>. All fees, costs, charges and other expenses incurred in the course of bankruptcy proceedings are to be regarded as expenses of the bankruptcy<sup>2</sup>. Any expenses<sup>3</sup> incurred by the official receiver, in whatever capacity he may be acting, in connection with proceedings taken against him in insolvency proceedings<sup>4</sup> are to be treated as expenses of the insolvency proceedings<sup>5</sup>.

1 See the Insolvency Act 1986 s 328(2); and para 577 post.

2 Insolvency Rules 1986, SI 1986/1925, r 12.2.

3 For these purposes, 'expenses' includes damages: *ibid* r 10.4(1).

4 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

5 Insolvency Rules 1986, SI 1986/1925, r 10.4(1). In respect of any sums due to him under r 10.4(1), the official receiver has a charge on the insolvent estate: r 10.4(2). For the meaning of 'the insolvent estate' see para 91 note 18 ante.

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **574 Bankruptcy expenses**

NOTE 4--SI 1986/1925 r 12.2 now r 12.2(1), r 12.2(2) added: SI 2003/1730.

NOTE 5--SI 1986/1925 r 10.4(2) amended: SI 2009/642.

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### **575. Expenses of voluntary arrangements.**

Where a bankruptcy order is made on a petition<sup>1</sup> by the supervisor of, or any person, other than the individual, who is for the time being bound by, a voluntary arrangement proposed by the individual and approved under Part VIII of the Insolvency Act 1986<sup>2</sup>, any expenses properly incurred as expenses of the administration of the voluntary arrangement in question are a first charge on the bankrupt's estate<sup>3</sup>.

Where a bankruptcy order is made on a debtor's petition<sup>4</sup> and there is at the time of the petition in force a voluntary arrangement under Part VIII of the Insolvency Act 1986, any expenses properly incurred as expenses of the administration of the arrangement in question are a first charge on the bankrupt's estate<sup>5</sup>.

1    le under the Insolvency Act 1986 s 264(1)(c): see para 124 head (3) ante.

2    le under ibid Pt VIII (see 252-263): see para 81 et seq ante.

3    Ibid s 276(2). For the meaning of 'the bankrupt's estate' see para 216 ante.

4    As to debtor's petitions see paras 159, 188 et seq ante.

5    Insolvency Rules 1986, SI 1986/1925, r 6.46A (added by SI 1987/1919).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **576. General rule as to priority of bankruptcy expenses.**

The expenses of the bankruptcy are payable out of the estate in the following order of priority:

- 709 (1) expenses properly chargeable or incurred by the official receiver or the trustee in preserving, realising or getting in any of the assets of the bankrupt, including those incurred in acquiring title to after-acquired property<sup>1</sup>;
- 710 (2) any other expenses incurred or disbursements made by the official receiver or under his authority, including those incurred or made in carrying on the business of a debtor or bankrupt<sup>2</sup>;
- 711 (3) the fees payable under any fees order made<sup>3</sup>, including those payable to the official receiver, other than the fee referred to in head (4) below, and any remuneration payable to him under general regulations<sup>4</sup>;
- 712 (4) the fee payable under any fees order made<sup>5</sup> for the performance by the official receiver of his general duties as official receiver<sup>6</sup>, and any repayable deposit lodged by the petitioner under any such order as security for such fee, except where the deposit is applied to the payment of the remuneration of an insolvency practitioner appointed<sup>7</sup> by the court on a debtor's petition<sup>8</sup>;
- 713 (5) the cost of any security provided<sup>9</sup> by an interim receiver, trustee or special manager<sup>10</sup>;
- 714 (6) the remuneration of the interim receiver, if any<sup>11</sup>;
- 715 (7) any deposit lodged on an application for the appointment of an interim receiver<sup>12</sup>;
- 716 (8) the costs of the petitioner, and of any person appearing on the petition whose costs are allowed by the court<sup>13</sup>;
- 717 (9) the remuneration of the special manager, if any<sup>14</sup>;
- 718 (10) any amount payable to a person employed or authorised<sup>15</sup> to assist in the preparation of a statement of affairs or of accounts<sup>16</sup>;
- 719 (11) any allowance made, by order of the court, towards costs on an application for release from the obligation to submit a statement of affairs, or for an extension of time for submitting such a statement<sup>17</sup>;
- 720 (12) any necessary disbursements by the trustee in the course of his administration, including expenses incurred by members of the creditors' committee or their representatives and allowed<sup>18</sup> by the trustee, but not including any payment of capital gains tax in circumstances referred to in head (15) below<sup>19</sup>;
- 721 (13) the remuneration or emoluments of any person, including the bankrupt, who has been employed by the trustee to perform<sup>20</sup> any services for the estate<sup>21</sup>;
- 722 (14) the remuneration of the trustee, up to any amount not exceeding that which is payable to the official receiver under general regulations<sup>22</sup>;
- 723 (15) the amount of any capital gains tax on chargeable gains accruing on the realisation of any asset of the bankrupt, without regard to whether the realisation is effected by the trustee, a secured creditor or a receiver or manager appointed to deal with a security<sup>23</sup>;
- 724 (16) the balance, after payment of any sums due under head (14) above, of any remuneration due to the trustee<sup>24</sup>.

The costs of employing a shorthand writer, if appointed by an order of the court made at the instance of the official receiver in connection with an examination, rank in priority with those specified in head (1) above; and the costs of employing a shorthand writer so appointed in any other case rank after the allowance mentioned in head (11) above and before the disbursements mentioned in head (12) above<sup>25</sup>.

Any expenses incurred in holding an examination<sup>26</sup> where the examinee is unfit, where the application for it is made by the official receiver, rank in priority with those specified in head (1) above<sup>27</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.224(1)(a). As to after-acquired property see para 445 et seq ante. For the interpretation of the equivalent provision in relation to companies, ie the Insolvency Rules 1986, SI

1986/1925, r 4.218(1) (as amended), see *Re MC Bacon Ltd* [1991] Ch 127, [1990] 3 WLR 646; *Re Exchange Travel (Holdings) Ltd (in liquidation) (No 3)*, *Katz v McNally* [1997] 2 BCLC 579, sub nom *Katz v McNally* [1998] BCC 784, CA; *Mond v Hammond Suddards (a firm)* [2000] Ch 40, [1999] 3 WLR 697, CA; *Re Toshoku Finance UK plc* [2002] UKHL 6, [2002] 1 WLR 671; *Lewis v IRC* [2001] 3 All ER 499, sub nom *Re Floor Fourteen Ltd, Lewis v IRC* [2001] 2 BCLC 392, CA.

2 Insolvency Rules 1986, SI 1986/1925, r 6.224(1)(b).

3 le any order made under the Insolvency Act 1986 s 415: see para 816 post.

4 Insolvency Rules 1986, SI 1986/1925, r 6.224(1)(c) (substituted by SI 1995/586).

5 See note 3 supra.

6 Insolvency Rules 1986, SI 1986/1925, r 6.224(1)(d)(i) (substituted by SI 1995/586).

7 le under the Insolvency Act 1986 s 273: see para 200 ante.

8 Insolvency Rules 1986, SI 1986/1925, r 6.224(1)(d)(ii) (substituted by SI 1995/586).

9 le in accordance with the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

10 Ibid r 6.224(1)(e).

11 Ibid r 6.224(1)(f). As to the interim receiver see para 222 et seq ante.

12 Ibid r 6.224(1)(g).

13 Ibid r 6.224(1)(h).

14 Ibid r 6.224(1)(j). As to the special manager see para 236 et seq ante.

15 le under ibid Pt 6 Ch 5 (rr 6.58-6.72): see para 245 et seq ante.

16 Ibid r 6.224(1)(k).

17 Ibid r 6.224(1)(l). As to the release from the obligation to submit a statement of affairs and the extension of time for submitting such a statement see para 248 ante.

18 le under ibid r 6.164: see para 339 ante.

19 Ibid r 6.224(1)(m). For the interpretation of the corresponding provision in relation to companies see *Re Toshoku Finance UK plc* [2002] UKHL 6, [2002] 1 WLR 671.

20 le as required or authorised by or under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

21 Ibid r 6.224(1)(n).

22 Ibid r 6.224(1)(o). As to the trustee's remuneration generally see para 351 et seq ante.

23 Ibid r 6.224(1)(p).

24 Ibid r 6.224(1)(q).

25 Ibid r 6.224(2). As to shorthand writers see para 306 ante and para 795 post.

26 le under ibid r 6.174: see para 297 ante.

27 Ibid r 6.224(3).

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **576 General rule as to priority of bankruptcy expenses**

NOTE 1--SI 1986/1925 rr 4.218A-4.218E (litigation expenses and property subject to a floating charge), Sch 4 Form 4.74 added: SI 2008/737.

NOTE 4--SI 1986/1925 r 6.224(1)(c) amended: SI 2004/584.

TEXT AND NOTE 22--For 'to the official receiver under general regulations' read 'under SI 1986/1925 Sch 6': r 6.224(1)(o) (amended by SI 2005/527).

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## **577. Preferential debts generally.**

In the distribution of the bankrupt's estate<sup>1</sup>, his preferential debts<sup>2</sup> must be paid in priority to other debts<sup>3</sup>. Preferential debts rank equally between themselves after the expenses of the bankruptcy and must be paid in full unless the bankrupt's estate is insufficient for meeting them in which case they abate in equal proportions between themselves<sup>4</sup>. Preferential debts are considered subsequently<sup>5</sup>. Where a preferential debt is expressed to be referable to debts of the bankrupt which have accrued during a specified period next before 'the relevant date', that date is:

- 725 (1) where at the time the bankruptcy order was made there was an interim receiver appointed<sup>6</sup>, the date on which the interim receiver was first appointed after the presentation of the bankruptcy petition; or
- 726 (2) otherwise, the date of the making of the bankruptcy order<sup>7</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 A reference in the Insolvency Act 1986 to the preferential debts of an individual is to the debts listed in s 386(1), Sch 6 (as amended) (see para 578 et seq post); and references to preferential creditors are to be read accordingly: s 386(1) (amended by the Insolvency (ECSC Levy Debts) Regulations 1987, SI 1987/2093, reg 2(2); the Finance Act 1991 s 7, Sch 2 para 21A (added by the Finance (No 2) Act 1992 s 9(1), (2)); the Finance Act 1993 s 36(1); the Finance Act 1994 s 64, Sch 7 para 7(2); the Finance Act 1995 s 17; the Finance Act 1996 s 60, Sch 5 para 12(1); the Finance Act 2000 s 30(2), Sch 7 para 3(1)(a); the Finance Act 2001 s 27, Sch 5 para 17(1)(a)). The Insolvency Act 1986 Sch 6 (as amended) is to be read with the Pension Schemes Act 1993 s 128, Sch 4 (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 859): Insolvency Act 1986 s 386(3) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 18). In the Insolvency Act 1986 Sch 6 (as amended) 'the debtor' means the individual concerned: s 386(2).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 386 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 34. As to the administration in bankruptcy of the insolvent estates of deceased debtors see further para 823 et seq post.

3 Insolvency Act 1986 s 328(1). Section 328 is without prejudice to any provision of the Insolvency Act 1986 or any other Act under which the payment of any debt or the making of any other payment is, in the event of bankruptcy, to have a particular priority or to be postponed: s 328(6).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 328 applies with the modification that for the words 'commencement of

the bankruptcy' there are to be substituted the words 'date of death of the deceased debtor': Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 24.

As to the modification of the Insolvency Act 1986 s 328 by the Insolvent Partnerships Order, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1242-1245, 1286.

4 Insolvency Act 1986 s 328(2). By virtue of the Mercantile Law Amendment Act 1856 s 5, a surety who discharges a preferred debt will be entitled to the creditor's priority: *Re Lamplugh Iron Ore Co Ltd* [1927] 1 Ch 308; *Re Lord Churchill, Manisty v Churchill* (1888) 39 ChD 174. Secured creditors in bankruptcy are not affected: *Richards v Kidderminster Overseers, Richards v Kidderminster Corpn* [1896] 2 Ch 212.

As to preferential payments by a trustee under a deed of arrangement see the Deeds of Arrangement Act 1914 s 17 and para 873 post; and as to payment of expenses of a trustee who acts under a void deed see s 21 and para 883 post.

5 See para 578 et seq post.

6 Ie under the Insolvency Act 1986 s 286: see para 223 et seq ante.

7 Ibid s 387(1), (6). For the purposes of s 258 (individual voluntary arrangements: see para 100 ante), 'the relevant date' is, in relation to a debtor who is not an undischarged bankrupt, the date of the interim order made under s 252 (see para 83 ante) with respect to his proposal: s 387(1), (5). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 387(1), (5), (6) applies with the modification that in s 387(6)(a), (b) (see text heads (1), (2) supra) for the reference to the making of the bankruptcy order there is to be substituted a reference to the date of death of the deceased debtor: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 35.

As to the modification of the Insolvency Act 1986 s 387 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1291.

As from such day as the Secretary of State may by order made by statutory instrument appoint in the Insolvency Act 1986 s 387(5) for the words following 'undischarged bankrupt' there are to be substituted the words '(a) where an interim order has been made under section 252 with respect to his proposal, the date of that order; and (b) in any other case, the date on which the voluntary arrangement takes effect': Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 15. At the date at which this volume states the law no such day had been appointed.

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 577 Preferential debts generally

NOTE 2--Insolvency Act 1986 s 386(1) amended: Enterprise Act 2002 s 251(3). Finance Act 1991 Sch 2 para 21A, Finance Act 1993 s 36(1), Finance Act 1994 Sch 7 para 7(2), Finance Act 1995 s 17 (in part), Finance Act 1996 Sch 5 para 12(1), Finance Act 2000 Sch 7 para 3 and Finance Act 2001 Sch 5 para 17(1) repealed: 2002 Act Sch 26.

NOTE 7--Day now appointed: SI 2002/2711.

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## **578. Debts due to the Inland Revenue.**

The following sums due to the Commissioners of Inland Revenue<sup>1</sup> constitute preferential debts:

- 727 (1) sums due at the relevant date<sup>2</sup> from the bankrupt on account of deductions<sup>3</sup> of income tax from emoluments paid during the period of 12 months next before that date<sup>4</sup>;
- 728 (2) sums due at the relevant date from the bankrupt in respect of such deductions as are required to be made by the bankrupt for that period under the provisions<sup>5</sup> relating to sub-contractors in the construction industry<sup>6</sup>.

1 As to the Commissioners of Inland Revenue see INCOME TAXATION.

2 For the meaning of 'the relevant date' see para 577 ante.

3 The deductions referred to are those which the bankrupt was liable to make under the Income and Corporation Taxes Act 1988 s 203 (as amended) (pay as you earn: see INCOME TAXATION) less the amount of the repayments of income tax which the bankrupt was liable to make during that period: Insolvency Act 1986 s 386, Sch 6 para 1 (amended by the Income and Corporation Taxes Act 1988 s 844(1), (2), Sch 29 para 32, Table).

As to the application of the Insolvency Act 1986 s 386 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 577 note 2 ante.

4 Ibid Sch 6 para 1 (as amended: see note 3 supra). Unpaid income tax due from the bankrupt himself is not a preferential debt.

5 In the Income and Corporation Taxes Act 1988 s 559 (as amended): see INCOME TAXATION.

6 Insolvency Act 1986 Sch 6 para 2 (amended by the Income and Corporation Taxes Act 1988 Sch 29 para 32, Table).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **578-580 Debts due to the Inland Revenue ... Social security contributions**

Insolvency Act 1986 Sch 6 paras 1-7 repealed: Enterprise Act 2002 s 251(1), Sch 26.

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## **579. Debts due to HM Customs and Excise.**

The following sums due to the Commissioners of Customs and Excise constitute preferential debts:

- 729 (1) any value added tax which is referable to the period of six months next before the relevant date<sup>1</sup>;
- 730 (2) any insurance premium tax which is referable to the period of six months next before the relevant date<sup>2</sup>;
- 731 (3) any landfill tax which is referable to the period of six months next before the relevant date<sup>3</sup>;
- 732 (4) any climate change levy which is referable to the period of six months next before the relevant date<sup>4</sup>;
- 733 (5) any aggregates levy which is referable to the period of six months next before the relevant date<sup>5</sup>;
- 734 (6) the amount of any car tax which is due at the relevant date from the bankrupt and which became due within a period of 12 months next before that date<sup>6</sup>;
- 735 (7) any amount which is due:

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- 4. (a) by way of general betting duty, bingo duty or gaming duty; or
- 5. (b) by way of general betting duty and pool betting duty recoverable from the agent collecting stakes<sup>7</sup>,

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- 736 from the bankrupt at the relevant date and which became due within the period of 12 months next before that date<sup>8</sup>;
- 737 (8) the amount of any excise duty on beer which is due at the relevant date from the bankrupt and which became due within a period of six months next before that date<sup>9</sup>;
- 738 (9) any amount which is due by way of lottery duty from the bankrupt at the relevant date and which became due within the period of 12 months next before that date<sup>10</sup>;
- 739 (10) any amount which is due by way of air passenger duty from the bankrupt at the relevant date and which became due within the period of six months next before that date<sup>11</sup>.

1 Insolvency Act 1986 s 386, Sch 6 para 3. For these purposes, where the whole of the prescribed accounting period to which any value added tax is attributable falls within the period of six months next before the relevant date, the whole amount of that tax is referable to that six-month period; and in any other case the amount of any value added tax which is referable to the period of six months next before the relevant date is the proportion of the tax which is equal to such proportion, if any, of the accounting reference period in question as falls within such six-month period: Sch 6 para 3. 'Prescribed' means prescribed by regulations under the Valued Added Tax Act 1994: Insolvency Act 1986 Sch 6 para 3 (amended by the Value Added Tax Act 1994 s 100(1), Sch 14 para 8). For the meaning of 'the relevant date' see para 577 ante. As to value added tax generally see VALUE ADDED TAX vol 49(1) (2005 Reissue) para 1 et seq.

As to the application of the Insolvency Act 1986 s 386 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 577 note 2 ante.

2 Ibid Sch 6 para 3A (added by the Finance Act 1994 s 64, Sch 7 para 7(2)). For these purposes: (1) where the whole of the accounting period to which any insurance premium tax is attributable falls within that period of six months, the whole amount of that tax is referable to that period; and (2) in any other case the amount of any insurance premium tax which is referable to that period of six months is the proportion of the tax which is equal to such proportion, if any, of the accounting period in question as falls within that period of six months; and references to accounting periods are to be construed in accordance with the Finance Act 1994 Pt III (ss 48-74) (see INSURANCE): Insolvency Act 1986 Sch 6 para 3A (as so added).

3 Ibid Sch 6 para 3B (added by the Finance Act 1996 s 60, Sch 5 para 12(1)). For these purposes: (1) where the whole of the accounting period to which any landfill tax is attributable falls within that period of six months, the whole amount of that tax is referable to that period; and (2) in any other case the amount of any landfill tax which is referable to that period of six months is the proportion of the tax which is equal to such proportion, if any, of the accounting period in question as falls within that period of six months; and references to accounting periods are to be construed in accordance with the Finance Act 1996 Pt III (ss 39-71) (as amended) (see LANDFILL TAX vol 61 (2010) PARA 901 et seq): Insolvency Act 1986 Sch 6 para 3B (as so added).

4 Ibid Sch 6 para 3C (added by the Finance Act 2000 s 30(2), Sch 7 para 3(2)). For these purposes: (1) where the whole of the accounting period to which any climate change levy is attributable falls within that period of six months, the whole amount of that levy is referable to that period; and (2) in any other case the amount of any climate change levy which is referable to that period of six months is the proportion of the levy which is equal to such proportion, if any, of the accounting period in question as falls within that period of six months; and references to accounting periods are to be construed in accordance with the Finance Act 2000 s 30(1), Sch 6 (see FUEL AND ENERGY): Insolvency Act 1986 s 30(1), Sch 6 para 3C (as so added).

5 Ibid Sch 6 para 3D (added by the Finance Act 2001 s 27, Sch 5 para 18(2)). For these purposes: (1) where the whole of the accounting period to which any aggregates levy is attributable falls within that period of six months, the whole amount of that levy is referable to that period; and (2) in any other case the amount of any aggregates levy which is referable to that period of six months is the proportion of the levy which is equal to such proportion, if any, of the accounting period in question as falls within that period of six months; and references to accounting periods are to be construed in accordance with the Finance Act 2001 Pt II (ss 16-49) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) para 834 et seq): Insolvency Act 1986 Sch 6 para 3D (as so added).

6 Ibid Sch 6 para 4.

7 le under the Betting and Gaming Duties Act 1981 s 12(1): see LICENSING AND GAMBLING vol 68 (2008) PARAS 748, 754.

8 Insolvency Act 1986 Sch 6 para 5 (amended by the Finance Act 1997 ss 13(2), 113, Sch 2 para 6, Sch 18 Pt II).

9 Insolvency Act 1986 Sch 6 para 5A (added by the Finance Act 1991 s 7(4), (5), Sch 2 para 22).

10 Insolvency Act 1986 Sch 6 para 5B (added by the Finance Act 1993 s 36(2)).

11 Insolvency Act 1986 Sch 6 para 5C (added by the Finance Act 1994 s 40(2), Sch 6 para 13(1)).

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 578-580 Debts due to the Inland Revenue ... Social security contributions

Insolvency Act 1986 Sch 6 paras 1-7 repealed: Enterprise Act 2002 s 251(1), Sch 26.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/(i) Priority of Debts/580. Social security contributions.

### 580. Social security contributions.

The following sums due by way of contributions in respect of social security constitute preferential debts:

- 740 (1) all sums which on the relevant date<sup>1</sup> are due from the bankrupt on account of Class 1 or Class 2 contributions under the Social Security Contributions and Benefits Act 1992 or the Social Security (Northern Ireland) Act 1975 and which became due from the bankrupt in the 12 months next before the relevant date<sup>2</sup>;

741 (2) all sums which on the relevant date have been assessed on and are due from the bankrupt on account of Class 4 contributions under the Social Security Contributions and Benefits Act 1992 or the Social Security (Northern Ireland) Act 1975, being sums which are due to the Commissioners of Inland Revenue, rather than to the Secretary of State or a Northern Ireland department, and which are assessed on the bankrupt up to 5 April next before the relevant date, but not exceeding, in the whole, any one year's assessment<sup>3</sup>.

1 For the meaning of 'the relevant date' see para 577 ante.

2 Insolvency Act 1986 s 386, Sch 6 para 6 (amended by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 73). See further SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 34 et seq. As to the application of the Insolvency Act 1986 s 386 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 577 note 2 ante.

3 Ibid Sch 6 para 7.

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **578-580 Debts due to the Inland Revenue ... Social security contributions**

Insolvency Act 1986 Sch 6 paras 1-7 repealed: Enterprise Act 2002 s 251(1), Sch 26.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/(i) Priority of Debts/581. Contributions to occupational pension schemes.

### **581. Contributions to occupational pension schemes.**

Any sum which is owed by the bankrupt and is a sum to which the statutory provisions relating to contributions to occupational pension schemes and state scheme premiums<sup>1</sup> apply constitutes a preferential debt<sup>2</sup>.

1 le to which the Pension Schemes Act 1993 s 128, Sch 4 (as amended) applies: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 859.

2 Insolvency Act 1986 s 386, Sch 6 para 8 (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 18). As to the application of the Insolvency Act 1986 s 386 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 577 note 2 ante.

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/(i) Priority of Debts/582. Remuneration etc of employees.

## **582. Remuneration etc of employees.**

The following sums due to employees constitute preferential debts:

- 742 (1) so much of any amount as does not exceed so much as may be prescribed by order made by the Secretary of State<sup>1</sup> which is owed by the bankrupt to a person who is or has been an employee of the bankrupt, and which is payable by way of remuneration in respect of the whole or any part of the period of four months next before the relevant date<sup>2</sup>;
- 743 (2) an amount owed by way of accrued holiday remuneration, in respect of any period of employment before the relevant date, to a person whose employment by the bankrupt has been terminated, whether before, on or after that date<sup>3</sup>;
- 744 (3) so much of any sum owed in respect of money advanced for the purpose as has been applied for the payment of a debt which, if it had not been paid, would have been a debt falling within either of head (1) or head (2) above<sup>4</sup>;
- 745 (4) so much of any amount as does not exceed such amount as may be prescribed by order made by the Secretary of State which is ordered, whether before or after the relevant date, to be paid by the bankrupt under the Reserve Forces (Safeguard of Employment) Act 1985, and is so ordered in respect of a default made by the bankrupt before that date in the discharge of his obligations under that Act<sup>5</sup>.

For these purposes, a sum is payable by the bankrupt to a person by way of remuneration in respect of any period if:

- 746 (a) it is paid as wages or salary, whether payable for time or for piece work or earned wholly or partly by way of commission, in respect of services rendered to the bankrupt in that period<sup>6</sup>; or
- 747 (b) it is an amount payable by the bankrupt in respect of that period and constitutes a guarantee payment<sup>7</sup> or any payment for time off<sup>8</sup> or remuneration on suspension on medical grounds or on maternity grounds<sup>9</sup> or remuneration under a protective award<sup>10</sup> made by an employment tribunal<sup>11</sup>.

In a case in which a person's employment has been terminated by or in consequence of his employer being adjudged bankrupt, holiday remuneration is deemed to have accrued to that person in respect of any period of employment if, by virtue of that person's contract of employment or of any enactment or of an order or direction made under an enactment<sup>12</sup>, that remuneration would have accrued in respect of that period if that person's employment had continued until he became entitled to be allowed the holiday<sup>13</sup>.

Without prejudice to these provisions, any remuneration payable by the bankrupt to a person in respect of a period of holiday or of absence from work through sickness or other good cause is deemed to be wages or, as the case may be, salary in respect of services rendered to the

bankrupt in that period; and, for these purposes, references to remuneration in respect of a period of holiday include any sums which, if they had been paid, would have been treated for the purposes of the enactments relating to social security<sup>14</sup> as earnings in respect of that period<sup>15</sup>.

1 Orders made under the Insolvency Act 1986 s 386, Sch 6 para 9 or Sch 6 para 12 (see *infra*) may contain such transitional provisions as may appear to the Secretary of State necessary or expedient and must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Sch 6 para 16(a), (b). The amount prescribed for the purposes of Sch 6 para 9 (see text and note 2 *infra*) and Sch 6 para 12 (see text and note 5 *infra*) is £800: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 4.

As to the application of the Insolvency Act 1986 s 386 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 577 note 2 *ante*.

2 *Ibid* Sch 6 para 9. For the meaning of 'the relevant date' see para 577 *ante*. As to the amount prescribed for the purposes of Sch 6 para 9 see note 1 *supra*.

3 *Ibid* Sch 6 para 10.

4 *Ibid* Sch 6 para 11. Whether a wages cheque drawn by a bankrupt on an overdrawn account is regarded as paid out of money advanced for the purpose depends on the way in which the account is kept: see *Re Primrose (Builders) Ltd* [1950] Ch 561, [1950] 2 All ER 334 (where payments credited to an account were not regarded as appropriated to sums advanced by a bank for wages); *Re EJ Morel (1934) Ltd* [1962] Ch 21, [1961] 1 All ER 796 (current account and wages account interdependent: contrary result). See also *Re Rampgill Mill Ltd* [1967] Ch 1138, [1967] 1 All ER 56 (no wages account; lending bank arranged for another bank to cash company's cheques, principally for wages; money held to have been advanced for wages).

5 Insolvency Act 1986 Sch 6 para 12. As to the amount prescribed for the purposes of Sch 6 para 12 see note 1 *supra*.

6 *Ibid* Sch 6 para 13(1)(a).

7 *Ie* under the Employment Rights Act 1996 Pt III (ss 28-35) (as amended): see EMPLOYMENT vol 39 (2009) PARA 237 *et seq*.

8 *Ie* under *ibid* s 53 (looking for work etc: see EMPLOYMENT vol 39 (2009) PARA 303) or s 56 (ante-natal care: see EMPLOYMENT vol 39 (2009) PARA 307) or the Trade Union and Labour Relations (Consolidation) Act 1992 s 169 (as amended) (trade union duties: see EMPLOYMENT vol 40 (2009) PARA 1014).

9 *Ie* under the Employment Rights Act 1986 Pt VII (ss 64-70) (as amended): see EMPLOYMENT vol 39 (2009) PARA 316 *et seq*.

10 *Ie* under the Trade Union and Labour Relations (Consolidation) Act 1992 s 189 (as amended) (trade union duties): see EMPLOYMENT vol 41 (2009) PARA 1155.

11 Insolvency Act 1986 Sch 6 para 13(1)(b), (2) (substituted by the Employment Rights Act 1996 s 240, Sch 1 para 29). As to the rights of an employee on the insolvency of his employer to obtain payments from the Secretary of State see the Pension Schemes Act 1993 Pt VII Ch II (ss 123-127) (as amended); the Employment Rights Act 1996 Pt XII (ss 182-190); and EMPLOYMENT vol 39 (2009) PARA 556 *et seq*; SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 853 *et seq*.

12 For these purposes, the reference to any enactment includes an order or direction made under an enactment: Insolvency Act 1986 Sch 6 para 14(3).

13 *Ibid* Sch 6 para 14(1)(a), (2).

14 See SOCIAL SECURITY AND PENSIONS.

15 Insolvency Act 1986 Sch 6 para 15.

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/(i) Priority of Debts/583. Levies on coal and steel production.

### **583. Levies on coal and steel production.**

Any sums due at the relevant date<sup>1</sup> from the bankrupt in respect of the levies on the production of coal and steel<sup>2</sup> or any surcharge for delay<sup>3</sup> constitute preferential debts<sup>4</sup>.

1 For the meaning of 'the relevant date' see para 577 ante. The Insolvency Act 1986 s 386, Sch 6 para 15A (added by the Insolvency (ECSC Levy Debts) Regulations 1987, SI 1987/2093, reg 2(1)) has effect in relation to a bankrupt whether the relevant date is a date falling before or after 1 January 1988, but does not affect any declaration or payment of a dividend made before that date: Insolvency (ECSC Levy Debts) Regulations 1987, SI 1987/2093, reg 2(3).

As to the application of the Insolvency Act 1986 s 386 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 577 note 2 ante.

2 Ie the levies referred to in the Treaty establishing the European Coal and Steel Treaty (Paris, 18 April 1951; TS 16 (1979); Cmnd 7461) ('the ECSC Treaty') arts 49, 50: see EUROPEAN COMMUNITIES.

3 Ie any surcharge for delay provided for in the ECSC Treaty, art 50(3); ECSC High Authority Decision 3-52, art 6: see EUROPEAN COMMUNITIES.

4 Insolvency Act 1986 Sch 6 para 15A (as added: see note 1 supra). Where the payment of preferential debts falls to be regulated by the law in force at any time before 29 December 1986, there are to be treated as included among those debts any sums due from the bankrupt at the relevant date in respect of such levies or any such surcharge for delay: Insolvency (ECSC Levy Debts) Regulations 1987, SI 1987/2093, reg 4(1). For this purpose, 'the relevant date' means the date by reference to which the bankrupt's preferential debts fall to be ascertained in accordance with the law referred to in reg 4(1): reg 4(2).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **583 Levies on coal and steel production**

NOTES 2, 3--By virtue of art 97, the ECSC Treaty has now expired. Since 24 July 2002, the sectors previously covered by this Treaty, and the procedural rules and other secondary legislation derived from it, have been subject to the rules of the EC Treaty as well as the procedural rules and other secondary legislation derived from the EC Treaty.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/(i) Priority of Debts/584. Ordinary debts.

#### **584. Ordinary debts.**

Debts which are neither preferential debts<sup>1</sup> nor debts owed in respect of credit provided by the bankrupt's spouse<sup>2</sup> rank equally between themselves, and, after the preferential debts, must be paid in full unless the bankrupt's estate is insufficient for meeting them, in which case they abate in equal proportions between themselves<sup>3</sup>.

1 As to preferential debts see para 577 et seq ante.

2 Ie under the Insolvency Act 1986 s 329: see para 586 post.

3 Ibid s 328(3). Section 328 is without prejudice to any provision of the Insolvency Act 1986 or any other Act under which the payment of any debt or the making of any other payment is, in the event of bankruptcy, to have a particular priority or to be postponed: s 328(6).

As to the application of s 328 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, and as to the modification of s 328 in relation to the bankruptcy of an individual member of an insolvent partnership, see para 577 note 3 ante.

#### **UPDATE**

#### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/(i) Priority of Debts/585. Interest on debts.

#### **585. Interest on debts.**

Any surplus remaining after the payment of preferential debts<sup>1</sup> or debts which are ordinary debts and rank equally<sup>2</sup> must be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the commencement of the bankruptcy<sup>3</sup>; and interest on preferential debts ranks equally with interest on debts other than preferential debts<sup>4</sup>. The rate of interest so payable in respect of any debt is whichever is the greater of the rate specified in the Judgments Act 1838<sup>5</sup> at the commencement of the bankruptcy and the rate applicable to that debt apart from the bankruptcy<sup>6</sup>.

1 As to preferential debts see para 577 et seq ante.

2 Ie under the Insolvency Act 1986 s 328(3): see para 584 ante.

3 As to the commencement of bankruptcy see para 213 ante.

4 Insolvency Act 1986 s 328(4). Section 328 is without prejudice to any provision of the Insolvency Act 1986 or any other Act under which the payment of any debt or the making of any other payment is, in the event of bankruptcy, to have a particular priority or to be postponed: s 328(6).



As to the application of s 328 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, and as to the modification of s 328 in relation to the bankruptcy of an individual member of an insolvent partnership, see para 577 note 3 ante.

5 le the Judgments Act 1838 s 17 (as amended): see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1307.

6 Insolvency Act 1986 s 328(5).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/(i) Priority of Debts/586. Debts to bankrupt's spouse.

### **586. Debts to bankrupt's spouse.**

Debts owed in respect of credit provided by a person who, whether or not the bankrupt's spouse at the time the credit was provided, was the bankrupt's spouse at the commencement of the bankruptcy<sup>1</sup> rank in priority after the debts which are not preferential debts and interest on ordinary and preferential debts<sup>2</sup> and are payable with interest<sup>3</sup> in respect of the period during which they have been outstanding since the commencement of the bankruptcy, such interest having the same priority as the debts on which it is payable<sup>4</sup>.

The above provisions are without prejudice to any provision of the Insolvency Act 1986 or any other Act under which the payment of any debt or the making of any other payment is, in the event of bankruptcy, to have a particular priority or to be postponed<sup>5</sup>.

1 As to the commencement of bankruptcy see para 213 ante.

2 le the debts and interest required to be paid in pursuance of the Insolvency Act 1986 s 328(3), (4): see paras 584, 585 ante.

3 le at the rate specified in ibid s 328(5): see para 585 ante.

4 Ibid s 329(1), (2). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 329 applies with the modification that for the words 'commencement of the bankruptcy' there are to be substituted the words 'date of death of the deceased debtor': Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1919, art 3(1), Sch 1 Pt II para 24. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 Insolvency Act 1986 s 328(6). As to the application of s 328 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, and as to the modification of s 328 in relation to the bankruptcy of an individual member of an insolvent partnership, see para 575 note 3 ante.

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

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### **586 Debts to bankrupt's spouse**

TEXT AND NOTE 4--1986 Act s 329(1) amended: Civil Partnership Act 2004 Sch 27 para 116.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/(i) Priority of Debts/587. Loans for business purposes.

### **587. Loans for business purposes.**

Where a loan is made to a person engaged or about to engage in any business<sup>1</sup>, on a contract with that person, whether oral or written<sup>2</sup>, that the lender is to receive either a rate of interest varying with the profits<sup>3</sup>, or a share of the profits arising from carrying on the business<sup>4</sup>, then, if the borrower is adjudged bankrupt, or enters into an arrangement to pay his creditors less than 100 pence in the pound, or dies insolvent, the lender will not be entitled to recover anything in respect of his loan<sup>5</sup>, until the claims of the borrower's other creditors for valuable consideration in money or money's worth have been satisfied<sup>6</sup>.

The creditor who is party to such a contract will be so postponed, even if the contract is for payment of a fixed sum out of the profits<sup>7</sup>, or, where that is the real contract, even if the fixed sum is described as a salary<sup>8</sup>, or where a certain sum is to be paid for interest from which, if the borrower should be unable to pay it, a certain defined allowance would be made<sup>9</sup>. Where money is lent to a person engaged in business at interest varying with the profits, and security is given for the loan, the lender's rights in the security will not be affected by the borrower's bankruptcy<sup>10</sup>.

In the same way, where a person sells the goodwill of his business and receives in consideration for it, by way of annuity or otherwise, a portion of the profits of the business, that receipt will not of itself make him a partner in the business or liable as such<sup>11</sup>; but, if the buyer is adjudged bankrupt, enters into an arrangement to pay his creditors less than 100 pence in the pound, or dies insolvent, the seller of the goodwill cannot prove<sup>12</sup> or recover anything in respect of the profits, until the claims of all the other creditors for valuable consideration in money or money's worth have been satisfied<sup>13</sup>.

If a person advances money to another, not by way of loan but as a contribution to the capital of a business carried on for their joint benefit, the person who has made the advance, even though he is not a partner in the business and has received no share of the profits as such, is debarred from proving in the bankruptcy of the recipient of the money in competition with the creditors of the business<sup>14</sup>.

1 The term 'business' applies not only to a lifelong or universal business, but also to any separate commercial venture on which a trader or firm of traders embarks: *Re Abenheim, ex p Abenheim* (1913) 109 LT 219; and see PARTNERSHIP vol 79 (2008) PARA 6.

2 *Re Fort, ex p Schofield* [1897] 2 QB 495, CA.

3 For the meaning of 'profits' see *Re Spanish Prospecting Co Ltd* [1911] 1 Ch 92 at 98, CA; and see PARTNERSHIP vol 79 (2008) PARA 129.

4 Such a contract was held not to be established where a debt, left on deposit in a firm on terms that a third party should be credited with a share of profits, was subsequently transferred in equity to the third party: *Re Pinto Leite and Nephews, ex p Visconde Des Olivaes* [1929] 1 Ch 221. Such a contract will not of itself, provided that it is in writing and signed by or on behalf of all the parties to it, make the lender a partner: see the Partnership Act 1890 s 2(3)(d); and PARTNERSHIP vol 79 (2008) PARA 20.

As to when there will be a partnership see PARTNERSHIP vol 79 (2008) PARA 10 et seq; *Re Megevand, ex p Delhasse* (1878) 7 ChD 511, CA; *Re Howard, ex p Tennant* (1877) 6 ChD 303, CA; *Walker v Hirsch* (1884) 27 ChD 460, CA; *Badeley v Consolidated Bank* (1888) 38 ChD 238, CA; *Davis v Davis* [1894] 1 Ch 393; *Re Young, ex p Jones* [1896] 2 QB 484; *Re Beard & Co, ex p Trustee* [1915] HBR 191, CA; *Re Pinto Leite and Nephews, ex p Visconde Des Olivaes* supra.

5 He may not even prove his debt in competition with other creditors: *Re Grason, ex p Taylor* (1879) 12 ChD 366, CA; and see *Re Tew, ex p Mills* (1873) 8 Ch App 569.

6 See the Partnership Act 1890 ss 2(3)(d), 3; and PARTNERSHIP vol 79 (2008) PARAS 20, 22, 23. These provisions are not affected by the Insolvency Act 1986: see s 328(6); and para 577 note 3 ante.

7 *Re Young, ex p Jones* [1896] 2 QB 484.

8 *Re Stone* (1886) 33 ChD 541. The time when the loan was made is the important one: *Re Stone* supra; *Re Tew, ex p Mills* (1873) 8 Ch App 569. If, by the terms of the original contract, the case falls within the Partnership Act 1890 s 2 (see PARTNERSHIP vol 79 (2008) PARA 10 et seq), no alteration will take the case out of s 2 which does not amount to a repayment of the loan and the making of a fresh one: *Re Tew, ex p Mills* supra; *Re Grason, ex p Taylor* (1879) 12 ChD 366, CA; *Re Hildesheim, ex p Trustee* [1893] 2 QB 357. See also *Re Mason, ex p Bing* [1899] 1 QB 810 (where the original loan was to two partners, and, the partnership having been dissolved, the remaining partner took over the firm's liabilities).

9 *Re Vince, ex p Baxter* [1892] 1 QB 587; revsd [1892] 2 QB 478, CA, but only on the ground that the 'due allowance' mentioned in the contract was unintelligible, and that the contract was, therefore, inoperative.

10 *Re Lonergan, ex p Sheil* (1877) 4 ChD 789, CA; *Badeley v Consolidated Bank* (1888) 38 ChD 238, CA.

11 See the Partnership Act 1890 s 2(3)(e); and PARTNERSHIP vol 79 (2008) PARA 17.

12 See the cases cited in note 5 supra.

13 See the Partnership Act 1890 s 3; and PARTNERSHIP vol 79 (2008) PARAS 22, 23. Nevertheless, where a person sells a business in consideration of an annuity which is not stated to be payable out of the profits, the seller's right of proof against the buyer's estate will not be postponed: *Re Gieve, ex p Shaw* (1809) 80 LT 737, CA. For the meaning of 'profits' see note 3 supra. A creditor is not 'satisfied' until he has received 100 pence in the pound on his admitted claim, interest, if any, payable on the claim to the date of the bankruptcy order (see para 213 ante) and interest from the date of the bankruptcy order: see the Insolvency Act 1986 s 328; and para 577 et seq ante.

14 *Re Meade, ex p Humber v Palmer* [1951] Ch 774, [1951] 2 All ER 168, DC.

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 588. Friendly societies.

In the bankruptcy<sup>1</sup> of an officer of a friendly society<sup>2</sup> who, by virtue of his office, has in his possession money or property of the society, the trustees of the society have a right to receive that money or property in preference to any other debt or claim against the officer's estate<sup>3</sup>. If the officer has received the money or property by virtue of his office<sup>4</sup>, it is immaterial that it cannot be traced<sup>5</sup>, or that he wrongfully omitted to pay it over after receipt<sup>6</sup>, or that there was a want of due diligence on the society's part<sup>7</sup>, or that at the date of the bankruptcy he has ceased to be an officer of the society<sup>8</sup>.

This preferential right in the trustees of the society applies only in the case of properly constituted officers<sup>9</sup>, and does not apply in the case of a society's bankers<sup>10</sup>, even though appointed under the rules<sup>11</sup>.

1 For these purposes, 'bankruptcy' includes the liquidation of a debtor's affairs by arrangement: Friendly Societies Act 1974 s 59(3). It is doubtful, however, whether this will apply to a voluntary arrangement approved under the Insolvency Act 1986 Pt VIII (ss 252-263) (see para 81 et seq ante). 'Preferential debt' (the priority of which may not be affected by any such approved arrangement: see s 258(5)) means any debt listed in s 386(1), Sch 6 (as amended) (see para 578 et seq ante): s 386(1). Schedule 6 (as amended) does not include debts owed to the trustees of friendly societies.

2 For these purposes, 'officer of a friendly society' includes any trustee, treasurer, secretary or member of the committee of management of a society or branch, or any person appointed by the society or branch, to sue and be sued on its behalf: Friendly Societies Act 1974 s 111(1). As to who is an officer see *Re Ashley, ex p Appach* (1840) 1 Mont D & De G 83; *Re Baston, ex p Riddell* (1842) 3 Mont D & De G 80 (savings bank); *Re Wise, ex p Whipham* (1844) 3 Mont D & De G 564; *Re Rufford and Wragge, ex p Orford* (1852) 1 De GM & G 483.

3 Friendly Societies Act 1974 s 59(2). Nothing in the Insolvency Act 1986 s 328 (see para 573 ante) prejudices this provision: s 328(6). If the transaction amounted in substance to a loan to the bankrupt, there will be no priority (*Ex p Amicable Society of Lancaster* (1801) 6 Ves 98; *Ex p Ross* (1802) 6 Ves 802; *Ex p Stamford Friendly Society* (1808) 15 Ves 280; *Re Shattock, ex p Long Ashton Junior Friendly Society* (1861) 5 LT 370), even though an agreement to pay interest on money to come into an officer's hands will not defeat a claim to priority (*Re Woodlife, ex p Ray* (1839) 3 Deac 537).

4 The officer must have obtained the money or property by virtue of his office: *Re Aberdein, Hagon v Aberdein* [1896] WN 154; and see *Re Thick, ex p Buckland* (1818) Buck 214; *Re Jardine, ex p Fleet* (1850) 4 De G & Sm 52 (savings bank). To determine if he has, the Friendly Societies Act 1974 s 59 (as amended) is construed strictly: *Ex p Ross* (1802) 6 Ves 802; *Re West of England and South Wales District Bank, ex p Swansea Friendly Society* (1879) 11 ChD 768 (where it was held that an incorporated company cannot be an officer).

5 *Re Miller, ex p Official Receiver* [1893] 1 QB 327, CA.

6 *Re Welch, ex p Trustees of the Oddfellows Society* (1894) 63 LJQB 524.

7 *Moors v Marriott* (1878) 7 ChD 543; cf *Re Welch, ex p Trustees of the Oddfellows Society* (1894) 63 LJQB 524. See also *Re Baker, ex p Burge* (1841) 1 Mont D & De G 540; *Absolom v Gething* (1863) 32 LJ Ch 786.

8 *Re Eilbeck, ex p Trustees of the Good Intent Lodge No 987 of the Grand United Order of Oddfellows* [1910] 1 KB 136.

9 *Re Thick, ex p Buckland* (1818) Buck 214; *Re Aberdein, Hagon v Aberdein* [1896] WN 154.

10 *Re Rufford and Wragge, ex p Orford* (1852) 1 De GM & G 483; *Re West of England and South Wales District Bank, ex p Swansea Friendly Society* (1879) 11 ChD 768.

11 *Re Clarke, ex p Harris* (1845) De G 162.

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## **(ii) Means of Distribution**

### **589. Payment by dividend.**

Whenever the trustee has sufficient funds in hand for the purpose, he must, subject to the retention of such sums as may be necessary for the expenses of the bankruptcy, declare and distribute dividends among the creditors in respect of the bankruptcy debts which they have respectively proved<sup>1</sup>.

The trustee<sup>2</sup> must pay every dividend by payment instruments<sup>3</sup> which must be prepared by the Department of Trade and Industry on the application of the trustee and transmitted to him for distribution amongst the creditors<sup>4</sup>. However, in respect of such an application made by the trustee, the Secretary of State, if requested to do so by the trustee, may, at his discretion, as an alternative to the issue of payment instruments, make payment by electronic transfer to the persons to whom the trustee would otherwise deliver payment instruments<sup>5</sup>.

Any application for such a payment instrument or payment by electronic transfer must be made by the trustee on a form obtainable from the Department for the purpose or on a form which is substantially similar<sup>6</sup>. The trustee must enter the total amount of every dividend that he desires to pay in the records to be kept<sup>7</sup> in one sum<sup>8</sup>.

On the trustee's vacating office, he must send to the Department any valid unclaimed or undelivered payment instruments for dividends after indorsing them with the word 'cancelled'<sup>9</sup>.

1 Insolvency Act 1986 s 324(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 324 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

2 For the meaning of 'trustee' see para 28 note 2 ante.

3 For these purposes, 'payment instrument' means a cheque or payable order: Insolvency Regulations 1994, SI 1994/2507, reg 3(1).

4 Ibid reg 23(1) (amended by SI 2000/485).

5 Insolvency Regulations 1994, SI 1994/2507, reg 23(1A) (added by SI 2000/485).

6 Insolvency Regulations 1994, SI 1994/2507, reg 23(2).

7 Ie under ibid reg 24: see para 380 ante.

8 Ibid reg 23(3).

9 Ibid reg 23(4).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **589 Payment by dividend**

NOTE 4--For 'Department of Trade and Industry' read 'Department for Business, Innovation and Skills': SI 1994/2507 (amended by SI 2009/2748).

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### **590. Unclaimed funds and dividends.**

Any money in the hands of the trustee<sup>1</sup> at the date of his vacation of office, or which comes into the hands of any former trustee at any time after his vacation of office, representing, in either case, unclaimed or undistributed assets of the bankrupt or dividends, must forthwith be paid by him into the Insolvency Services Account<sup>2</sup>. The Secretary of State must from time to time pay into the Consolidated Fund<sup>3</sup> out of the Insolvency Services Account so much of the sums standing to the credit of that Account as represents dividends which were declared before such date as the Treasury may from time to time determine and have not been claimed, and balances ascertained before that date which are too small to be divided among the persons entitled to them<sup>4</sup>.

1 For the meaning of 'trustee' see para 28 note 2 ante.

2 Insolvency Regulations 1994, SI 1994/2507, reg 31. As to the Insolvency Services Account see para 26 ante.

3 As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 711.

4 See the Insolvency Act 1986 s 407(1); and para 29 ante.

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

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### **591. Distribution of property in specie.**

With the permission of the creditors' committee<sup>1</sup>, the trustee may divide in its existing form amongst the bankrupt's creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold<sup>2</sup>. A permission so given may not be a general permission but must relate to a particular proposed exercise of the power in question; and a person dealing with the trustee in good faith and for value is not to be concerned to inquire whether any requisite permission has been given<sup>3</sup>.

Where the trustee has done anything without the requisite permission, the court or the creditors' committee may, for the purpose of enabling him to meet his expenses out of the bankrupt's estate, ratify what the trustee has done; but the committee may not do so unless it is satisfied that the trustee acted in a case of urgency and has sought its ratification without undue delay<sup>4</sup>.

1 As to the creditors' committee see para 328 et seq ante.

2 Insolvency Act 1986 s 326(1). The power conferred by s 326(1) is without prejudice to ss 315-319 (as amended) (disclaimer: see para 472 et seq ante); s 326(1). As to the application of s 326 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 458 note 5 ante.

3 Ibid s 326(2).

4 Ibid s 326(3).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **(iii) Declaration and Payment of Dividend**

#### **592. Notice of intended dividend.**

Before declaring a dividend, the trustee must give notice of his intention to do so to all creditors whose addresses are known to him and who have not proved their debts<sup>1</sup>. Before declaring a first dividend, the trustee must, unless he has previously by public advertisement invited creditors to prove their debts, give notice of the intended dividend by public advertisement<sup>2</sup>. Any such notice and any notice of a first dividend must specify a date ('the last date for proving') up to which proofs may be lodged; and the date must be the same for all creditors, and not less than 21 days from the date of the notice<sup>3</sup>. The trustee must in his notice state the intention to declare a dividend, specified as interim or final, as the case may be, within the period of four months from the last date for proving<sup>4</sup>.

1 Insolvency Act 1986 s 324(2); Insolvency Rules 1986, SI 1986/1925, r 11.2(1) (amended by SI 1987/1919). As to the application of the Insolvency Act 1986 s 324 in the case of the administration in bankruptcy of the

insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 589 note 1 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 11.2(1A) (added by SI 1987/1919).

3 Insolvency Rules 1986, SI 1986/1925, r 11.2(2) (amended by SI 1987/1919).

4 Insolvency Rules 1986, SI 1986/1925, r 11.2(3).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **592 Notice of intended dividend**

TEXT AND NOTE 2--SI 1986/1925 r 11.2(1A) substituted, r 11.2(1B) added: SI 2009/642.

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### **593. Final admission and rejection of proofs.**

Within seven days from the last date for proving<sup>1</sup>, the trustee must deal with every creditor's proof, in so far as not already dealt with, by admitting or rejecting it in whole or in part<sup>2</sup>, or by making such provision as he thinks fit in respect of it<sup>3</sup>. The trustee is not obliged to deal with proofs lodged after the last date for proving; but he may do so, if he thinks fit<sup>4</sup>.

1 For the meaning of 'the last date for proving' see para 592 ante.

2 As to admission and rejection of proofs see para 536 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 11.3(1).

4 Ibid r 11.3(2).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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OF BANKRUPT'S ESTATE/(iii) Declaration and Payment of Dividend/594. Postponement or cancellation of dividend.

#### **594. Postponement or cancellation of dividend.**

If in the period of four months stated in the trustee's notice of dividend<sup>1</sup>:

- 748 (1) the trustee has rejected a proof in whole or in part and application is made to the court for his decision to be reversed or varied<sup>2</sup>; or
- 749 (2) application is made to the court for the trustee's decision on a proof to be reversed or varied, or for a proof to be expunged, or for a reduction of the amount claimed<sup>3</sup>,

the trustee may postpone or cancel the dividend<sup>4</sup>.

- 1 In the period referred to in the Insolvency Rules 1986, SI 1986/1925, r 11.2(3): see para 592 ante.
- 2 See paras 536, 537 ante.
- 3 See paras 538, 539 ante.
- 4 Insolvency Rules 1986, SI 1986/1925, r 11.4.

### **UPDATE**

#### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **595. Decision to declare dividend.**

If the trustee has not, in the period of four months stated in his notice of intended dividend<sup>1</sup>, had cause to postpone or cancel the dividend, he must within that period proceed to declare the dividend of which he gave notice<sup>2</sup>. Except with the permission of the court, the trustee may not declare the dividend so long as there is pending any application to the court to reverse or vary a decision of his on a proof<sup>3</sup>, or to expunge a proof or to reduce the amount claimed<sup>4</sup>; and, if the court so gives permission, the trustee must make such provision in respect of the proof in question as the court directs<sup>5</sup>. In the calculation and distribution of a dividend the trustee must make provision for:

- 750 (1) any bankruptcy debts<sup>6</sup> which appear to him to be due to persons who, by reason of the distance of their place of residence, may not have had sufficient time to tender and establish their proofs;

- 751 (2) any bankruptcy debts which are the subject of claims which have not yet been determined; and  
 752 (3) disputed proofs and claims<sup>7</sup>.

1 le the period referred to in the Insolvency Rules 1986, SI 1986/1925, r 11.2(3): see para 592 ante.

2 Ibid r 11.5(1).

3 See para 537 ante.

4 See paras 538, 539 ante.

5 Insolvency Rules 1986, SI 1986/1925, r 11.5(2).

6 See para 491 ante.

7 Insolvency Act 1986 s 324(4). As to the application of s 324 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 589 note 1 ante.

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 596. Notice of declaration.

The trustee must give notice<sup>1</sup> of the dividend to all creditors who have proved their debts<sup>2</sup>. The notice must include the following particulars relating to the insolvency and the administration of the bankrupt's estate:

- 753 (1) amounts realised from the sale of assets, indicating, so far as practicable, amounts raised by the sale of particular assets;  
 754 (2) payments made by the trustee in the administration of the bankrupt's estate;  
 755 (3) provision, if any, made for unsettled claims, and funds, if any, retained for particular purposes;  
 756 (4) the total amount to be distributed, and the rate of dividend;  
 757 (5) whether, and if so when, any further dividend is expected to be declared<sup>3</sup>.

The dividend may be distributed simultaneously with the notice declaring it<sup>4</sup>.

Payment of dividend may be made by post, or arrangements may be made with any creditor for it to be paid to him in another way, or held for his collection<sup>5</sup>; and, where a dividend is paid on a bill of exchange or other negotiable instrument<sup>6</sup>, the amount of the dividend must be indorsed on the instrument, or on a certified copy of it, if required to be produced by the holder for that purpose<sup>7</sup>.

- 1 As to the mode of giving notice see para 797 post.
- 2 Insolvency Act 1986 s 324(3); Insolvency Rules 1986, SI 1986/1925, r 11.6(1). As to the application of the Insolvency Act 1986 s 324 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 589 note 1 ante.
- 3 Insolvency Rules 1986, SI 1986/1925, r 11.6(2).
- 4 Ibid r 11.6(3).
- 5 Ibid r 11.6(4).
- 6 As to proof in respect of negotiable instruments see para 571 ante.
- 7 Insolvency Rules 1986, SI 1986/1925, r 11.6(5).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

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### **597. Notice of no, or no further, dividend.**

If the trustee gives notice<sup>1</sup> to creditors that he is unable to declare any dividend or, as the case may be, any further dividend<sup>2</sup>, the notice must contain a statement to the effect either that no funds have been realised or that the funds realised have already been distributed or used or allocated for defraying the expenses of administration<sup>3</sup>.

- 1 As to the mode of giving notice see para 797 post.
- 2 See para 596 text to note 3 ante.
- 3 Insolvency Rules 1986, SI 1986/1925, r 11.7. As to the expenses of the bankruptcy see paras 574-576 ante.

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

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### **598. Proof made or altered after payment of dividend.**

Neither a creditor who has not proved his debt before the declaration of any dividend<sup>1</sup> nor a creditor who increases the amount claimed in his proof after a payment of dividend<sup>2</sup> is entitled to disturb<sup>3</sup> the distribution of the dividend<sup>4</sup>; but, when he has proved his debt or increased his proof, as the case may be, he is entitled to be paid, out of any money for the time being available for the payment of any further dividend, any dividend or dividends which he has failed to receive<sup>5</sup>. Any dividend or dividends so payable must be paid before such money is applied to the payment of any such further dividend<sup>6</sup>.

If, after a creditor's proof has been admitted, the proof is withdrawn or expunged, or the amount of it is reduced, the creditor is liable to repay to the trustee, for the credit of the bankrupt's estate, any amount overpaid by way of dividend<sup>7</sup>.

1 Insolvency Act 1986 s 325(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 325 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

2 Insolvency Rules 1986, SI 1986/1925, r 11.8(1).

3 Ie whether by reason that he has not participated in it, or participated to the right extent or otherwise.

4 Or, in the case of a creditor who proves late, any other dividend declared before his debt was proved: Insolvency Act 1986 s 325(1).

5 Ibid s 325(1)(a); Insolvency Rules 1986, SI 1986/1925, r 11.8(1).

6 Insolvency Act 1986 s 325(1)(b); Insolvency Rules 1986, SI 1986/1925, r 11.8(2).

7 Ibid r 11.8(3).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

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### **599. Secured creditors.**

Where a creditor revalues his security at a time when a dividend has been declared, the following provisions apply<sup>1</sup>.

If the revaluation results in a reduction of his unsecured claim ranking for dividend, the creditor must forthwith repay to the trustee, for the credit of the bankrupt's estate, any amount received by him as dividend in excess of that to which he would be entitled having regard to the revaluation of the security<sup>2</sup>.

If the revaluation results in an increase of his unsecured claim, the creditor is entitled to receive from the trustee, out of any money for the time being available for the payment of a further dividend, before any such further dividend is paid, any dividend or dividends which he has failed to receive, having regard to the revaluation of the security; but the creditor is not entitled to disturb any dividend declared, whether or not distributed, before the date of the revaluation<sup>3</sup>.

If a creditor contravenes any provision<sup>4</sup> relating to the valuation of securities, the court may, on the application<sup>5</sup> of the trustee, order that the creditor be wholly or partly disqualified from participation in any dividend<sup>6</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 11.9(1). As to revaluation by a creditor of his security see para 562 ante.

2 Ibid rr 11.9(2), 13.8(b).

3 Ibid r 11.9(3).

4 Ie any provision of the Insolventcy Act 1986 or the Insolventcy Rules 1986, SI 1986/1925 (as amended): see para 561 et seq ante.

5 As to the mode of application and the procedure see para 764 et seq post.

6 Insolventcy Rules 1986, SI 1986/1925, r 11.10.

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **600. Assignment of right to dividend.**

If a person entitled to a dividend gives notice<sup>1</sup> to the trustee that he wishes the dividend to be paid to another person, or that he has assigned his entitlement to another person, the trustee must pay the dividend to that other accordingly<sup>2</sup>. A notice so given must specify the name and address of the person to whom payment is to be made<sup>3</sup>.

1 As to the mode of giving notice see para 797 post.

2 Insolventcy Rules 1986, SI 1986/1925, r 11.11(1).

3 Ibid r 11.11(2).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

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#### **601. Preferential creditors.**

The provisions relating to declaration and payment of dividends<sup>1</sup> apply with respect to any distribution made in the bankruptcy to preferential creditors<sup>2</sup>, with such adaptations as are appropriate considering that such creditors are of a limited class<sup>3</sup>, save that the notice of the intended dividend by the trustee<sup>4</sup>, where a dividend is to be declared for preferential creditors, need only be given to those creditors in whose case he has reason to believe that their debts are preferential; and public advertisement of the intended dividend need only be given if the trustee thinks fit<sup>5</sup>.

1    le the Insolvency Rules 1986, SI 1986/1925, rr 11.1-11.13 (as amended): see para 592 et seq ante; infra; and para 602 post.

2    See para 577 ante.

3    Insolvency Rules 1986, SI 1986/1925, r 11.12(1).

4    le the notice under ibid r 11.12: see para 592 ante.

5    Ibid r 11.12(2) (amended by SI 1987/1919).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

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#### **602. Debts payable at future time.**

Where a creditor has proved for a debt of which payment is not due at the date of the declaration of dividend<sup>1</sup>, he is entitled to dividend equally with other creditors, but subject to a reduction in respect of his admitted proof<sup>2</sup>. Other creditors are not entitled to interest out of surplus funds<sup>3</sup> until any such creditor has been paid the full amount of his debt<sup>4</sup>.

1 As to proof of debts payable at a future time see para 546 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 11.13(1). For the purpose of dividend, and for no other purpose, the amount of the creditor's admitted proof, or, if a distribution has previously been made to him, the amount remaining outstanding in respect of his admitted proof, must be reduced by a percentage calculated as follows:

$$\frac{I \times M}{12}$$

where I is 5%, and M is the number of months, expressed, if need be, as, or as including, fractions of months, between the declaration of dividend and the date when payment of the creditor's debt would otherwise be due: r 11.13(2) (amended by SI 1987/1919). This rule does not apply in calculating the compensation due to a landlord following disclaimer of a lease: *Christopher Moran Holdings Ltd v Bairstow* [2000] 2 AC 172, sub nom *Re Park Air Services plc, Christopher Moran Holdings Ltd v Bairstow* [1999] 1 All ER 673, HL (where at 187, 188 and at 683 Lord Millett expressed the view that the drafting of this rule appeared to be 'seriously defective').

3 I.e. under the Insolvency Act 1986 s 328(4): see para 585 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 11.13(3).

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 602 Debts payable at future time

NOTE 2--For 'a percentage calculated as follows' read 'by applying the following formula'; the formula is now  $X/1.05^n$  where 'X' is the value of the admitted proof, and 'n' is the period beginning with the date of the bankruptcy order and ending with the date on which the payment of the creditor's debt would otherwise be due expressed in years and months in a decimalised form: SI 1986/1925 r 11.13(2), (3)(c) (r 11.13(2), substituted, r 11.13(3) added by SI 2005/527).

TEXT AND NOTES 3, 4--SI 1986/1925 r 11.13(3) revoked: SI 2005/527.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/(iii) Declaration and Payment of Dividend/603. Distribution in criminal bankruptcy.

### 603. Distribution in criminal bankruptcy.

Where the bankruptcy order was made on a criminal bankruptcy petition<sup>1</sup>, no distribution may be made<sup>2</sup> by means of dividend or in specie so long as an appeal is pending<sup>3</sup> against the

bankrupt's conviction of any offence by virtue of which the criminal bankruptcy order on which the petition was based was made<sup>4</sup>.

1 le under the Insolvency Act 1986 s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 post.

2 le under ibid ss 324-326: see para 591 et seq ante.

3 le within the meaning of ibid s 277: see para 215 ante. As to the prospective repeal of s 277 see para 844 note 2 post.

4 Ibid s 327. As to the prospective repeal of s 327 see para 844 note 2 post. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 327 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 23. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/(iii) Declaration and Payment of Dividend/604. Refusal by trustee to pay dividend.

#### 604. Refusal by trustee to pay dividend.

No action lies against the trustee for a dividend; but, if the trustee refuses to pay a dividend, the court may, if it thinks fit, order<sup>1</sup> him to pay it and also to pay, out of his own money, interest<sup>2</sup> on the dividend from the time it was withheld, and the costs of the proceedings in which the order to pay is made<sup>3</sup>.

1 As to the mode of application and the procedure see para 764 et seq post.

2 le at the rate for the time being specified in the Judgments Act 1838 s 17 (as amended): see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1307.

3 Insolvency Act 1986 s 325(2). As to the application of s 325 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 598 note 1 ante.

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.



Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/(iii) Declaration and Payment of Dividend/605. Final distribution.

## **605. Final distribution.**

When the trustee has realised all the bankrupt's estate<sup>1</sup> or so much of it as can, in the trustee's opinion, be realised without needlessly protracting the trusteeship, he must give notice in the prescribed manner<sup>2</sup> either of his intention to declare a final dividend or that no dividend, or further dividend, will be declared<sup>3</sup>. Such notice must contain the prescribed particulars<sup>4</sup> and must require claims against the bankrupt's estate to be established by a date ('the final date') specified in the notice<sup>5</sup>. On the application of any person, the trustee may postpone the final date<sup>6</sup>.

After the final date, the trustee must:

- 758 (1) defray any outstanding expenses of the bankruptcy out of the bankrupt's estate; and
- 759 (2) if he intends to declare a final dividend, declare and distribute that dividend without regard to the claim of any person in respect of a debt not already proved in the bankruptcy<sup>7</sup>.

If a surplus remains after payment in full and with interest of all the bankrupt's creditors and the payment of the expenses of the bankruptcy, the bankrupt is entitled to the surplus<sup>8</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 Ie under the Insolvency Rules 1986, SI 1986/1925, r 11.2 (as amended) (notice of intended dividend: see para 592 ante) or r 11.7 (notice of no, or no further, dividend: see para 597 ante). As to the mode of giving notice see para 797 post.

3 Insolvency Act 1986 s 330(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 330 applies with the modification that in s 330(5) (see *infra*) for the words 'the bankrupt is entitled to the surplus' there are to be substituted the words 'the surplus must be paid to the personal representative unless the court otherwise orders': Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 25. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 Ie under the Insolvency Rules 1986, SI 1986/1925, rr 11.1-11.13 (as amended): see para 592 et seq ante.

5 Insolvency Act 1986 s 330(2).

6 *Ibid* s 330(3). As to the mode of application and the procedure see para 764 et seq post.

7 *Ibid* s 330(4). In the case of the death of a debtor after the presentation of a bankruptcy petition, at the end of s 330(4)(b) (see text head (2) *supra*) there are to be added the words 'and of the personal representative of a debtor dying after the presentation of a bankruptcy petition in respect of reasonable funeral and testamentary expenses of which notice has not already been given to the trustee': Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 5(1), Sch 2 para 2.

8 Insolvency Act 1986 s 330(5). See also note 3 *supra*.

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **605 Final distribution**

NOTE 3--In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the 1986 Act s 330(5) is subject to EC Council Regulation 1346/2000 on insolvency proceedings art 35 (surplus in secondary proceedings to be transferred to main proceedings): 1986 Act s 330(6) (added by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240).

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## **606. Final meeting of creditors.**

Where it appears to the trustee that the administration of the bankrupt's estate<sup>1</sup> is for practical purposes complete and the trustee is not the official receiver, the trustee must summon a final general meeting<sup>2</sup> of the bankrupt's creditors which must receive the trustee's report of his administration of the bankrupt's estate and must determine whether the trustee should<sup>3</sup> have his release<sup>4</sup>.

If the trustee thinks fit, he may give the notice summoning the final general meeting at the same time as giving notice<sup>5</sup> of final distribution; but, if summoned for an earlier date, that meeting must be adjourned (and, if necessary, further adjourned) until a date on which the trustee is able to report to the meeting that the administration of the bankrupt's estate is for practical purposes complete<sup>6</sup>.

Where there is comprised in the bankrupt's estate property consisting of an interest in a dwelling house<sup>7</sup> which is occupied by the bankrupt or by his spouse or former spouse, and the trustee has been unable for any reason to realise that property, the trustee may not so summon a final meeting unless either:

- 760 (1) the court has made an order<sup>8</sup> imposing a charge on that property for the benefit of the bankrupt's estate; or
- 761 (2) the court has declined to make such an order; or
- 762 (3) the Secretary of State has issued a certificate to the trustee stating that it would be inappropriate or inexpedient for such an application to be made in the case in question<sup>9</sup>.

In the administration of the bankrupt's estate it is the trustee's duty to retain sufficient sums from the estate to cover the expenses of summoning and holding the meeting required by the above provisions<sup>10</sup>.

1    In accordance with the Insolvency Act 1986 Pt IX Ch V (ss 305-335) (as amended). For the meaning of 'the bankrupt's estate' see para 216 ante.

2    As to the procedure for the holding of the final meeting see para 378 ante.

3 le under the Insolvency Act 1986 s 299: see para 378 ante.

4 Ibid s 331(1), (2). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 331 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 26. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post; and as to the transitional provisions which apply see para 346 note 2 ante.

As to the modification of the Insolvency Act 1986 s 331 by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see paras 820, 822 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1290.

5 le under the Insolvency Act 1986 s 330(1): see para 605 ante.

6 Ibid s 331(3). In the case of a person adjudged bankrupt before 29 December 1986 (see para 2 ante), or adjudged bankrupt on or after that day on a petition presented before that day, in the application of s 331(3) in relation to such a case, the reference in s 331(3) to s 330(1) (see para 605 ante) has effect as a reference to the Bankruptcy Act 1914 s 67 (repealed): Insolvency Act 1986 s 437, Sch 11 para 14(1), (5).

7 For the meaning of 'dwelling house' see para 401 note 1 ante. As to the rights of occupation of a dwelling house forming part of the estate held by the bankrupt, his spouse or former spouse, and as to the right of the trustee to realise the dwelling house, see para 647 et seq post.

8 le under the Insolvency Act 1986 s 313: see para 401 ante.

9 Ibid s 332(1), (2). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 332 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 26.

10 Insolvency Act 1986 s 331(4).

## **UPDATE**

### **573-609 Distribution of bankrupt's estate**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **606 Final meeting of creditors**

TEXT AND NOTES--See SI 1986/1925 r 6.78D (distribution of property in specie) (added by SI 2010/686).

TEXT AND NOTE 9--1986 Act s 332(1) amended: Civil Partnership Act 2004 Sch 27 para 117.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/ (iv) Second Bankruptcy/607. Stay of distribution in case of second bankruptcy.

## **(iv) Second Bankruptcy**

### **607. Stay of distribution in case of second bankruptcy.**

Where a bankruptcy order is made against an undischarged bankrupt and the existing trustee<sup>1</sup> has been given the prescribed notice<sup>2</sup> of the presentation of the petition for the later bankruptcy<sup>3</sup>, any distribution or other disposition by him of:

- 763 (1) any property which is vested in the existing trustee as after-acquired property<sup>4</sup>;
- 764 (2) any money paid to the trustee in pursuance of an income payments order<sup>5</sup>; and
- 765 (3) any property or money which is, or in the hands of the existing trustee represents, the proceeds of sale or application of property or money falling within head (1) or head (2) above,

if made after the giving of the notice, is void except to the extent that it was made with the consent of the court or is or was subsequently ratified by the court<sup>6</sup>.

The above provisions are without prejudice to the statutory restrictions<sup>7</sup> on dispositions of property following the making of a bankruptcy order<sup>8</sup>.

1 For these purposes, 'the existing trustee' means the trustee, if any, of the bankrupt's estate for the purposes of the earlier bankruptcy: Insolvent Act 1986 s 334(1)(c). 'The earlier bankruptcy' means the bankruptcy (or, as the case may be, most recent bankruptcy) from which the bankrupt has not been discharged at the commencement of the later bankruptcy: s 334(1)(b). For the meaning of 'the later bankruptcy' see note 3 infra.

2 For the prescribed form of notice to the existing trustee of the presentation of a petition for a later bankruptcy see the Insolvency Rules 1986, SI 1986/1925, r 12.7(1), (2), Sch 4, Form 6.78 (substituted by SI 1987/1919).

3 For these purposes, 'the later bankruptcy' means the bankruptcy arising from a bankruptcy order made against an undischarged bankrupt: Insolvent Act 1986 s 334(1)(a).

4 Ie under ibid s 307(3): see para 446 ante.

5 Ie under ibid s 310 (as amended): see para 449 ante.

6 Ibid s 334(1)-(3). Sections 334, 335 (as amended) (see paras 608, 609 post) apply with the following modifications where the earlier bankruptcy is a bankruptcy in relation to which the Bankruptcy Act 1914 (repealed) applies instead of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended), that is to say: (1) references to property vested in the existing trustee under s 307(3) (see para 446 ante) have effect as references to such property vested in that trustee as was acquired by or devolved on the bankrupt after the commencement (within the meaning of the Bankruptcy Act 1914 (repealed)) of the earlier bankruptcy; and (2) references to an order under the Insolvency Act 1986 s 310 (as amended) (see para 449 ante) have effect as references to an order under the Bankruptcy Act 1914 s 51 (repealed): Insolvent Act 1986 s 437, Sch 11 para 16(1). The Bankruptcy Act 1914 s 39 (repealed) does not apply where a person who is an undischarged bankrupt under the 1914 Act is adjudged bankrupt under the Insolvency Act 1986: Sch 11 para 16(2).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, ss 334, 335 (as amended) apply: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 26. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

7 Ie the Insolvency Act 1986 s 284: see para 217 ante.

8 Ibid s 334(2).

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/ (iv) Second Bankruptcy/608. Adjustment between earlier and later bankrupt estates.

**608. Adjustment between earlier and later bankrupt estates.**

Where a bankruptcy order is made against an undischarged bankrupt, then, with effect from the commencement of the later bankruptcy<sup>1</sup>:

- 766 (1) any property which is vested in the existing trustee<sup>2</sup> as after-acquired property<sup>3</sup>;
- 767 (2) any money paid to the existing trustee in pursuance of an income payments order<sup>4</sup>; and
- 768 (3) any property or money which is, or in the hands of the existing trustee represents, the proceeds of sale or application of property or money falling within head (1) or head (2) above,

which, immediately before the commencement of that bankruptcy, is comprised in the bankrupt's estate<sup>5</sup> for the purposes of the earlier bankruptcy<sup>6</sup>, is to be treated as comprised in the bankrupt's estate for the purposes of the later bankruptcy and, until there is a trustee of that estate, is to be dealt with by the existing trustee<sup>7</sup>.

Any sums which in pursuance of an income payments order<sup>8</sup> are payable after the commencement of the later bankruptcy to the existing trustee form part of the bankrupt's estate for the purposes of the later bankruptcy; and the court may give such consequential directions for the modification of the order as it thinks fit<sup>9</sup>.

Except as provided above<sup>10</sup>, property which is, or is capable of being<sup>11</sup>, comprised in the bankrupt's estate for the purposes of the earlier bankruptcy, or of any bankruptcy prior to it, is not comprised in his estate for the purposes of the later bankruptcy<sup>12</sup>.

The creditors of the bankrupt in the earlier bankruptcy and the creditors of the bankrupt in any bankruptcy prior to the earlier one, are not to be creditors of his in the later bankruptcy in respect of the same debts; but the existing trustee may prove in the later bankruptcy for:

- 769 (a) the unsatisfied balance of the debts provable against the bankrupt's estate in the earlier bankruptcy;
- 770 (b) any interest payable on that balance; and
- 771 (c) any unpaid expenses of the earlier bankruptcy<sup>13</sup>.

Any amount so provable<sup>14</sup> ranks in priority after all the other debts provable in the later bankruptcy and after interest on those debts and, accordingly, may not be paid unless those debts and that interest have first been paid in full<sup>15</sup>.

<sup>1</sup> For the meaning of 'the later bankruptcy' see para 607 note 3 ante. As to the commencement of bankruptcy see para 213 ante.

- 2 For the meaning of 'the existing trustee' see para 607 note 1 ante.
- 3 Ie under the Insolvency Act 1986 s 307(3): see para 446 ante.
- 4 Ie under ibid s 310 (as amended): see para 449 ante.
- 5 For the meaning of 'the bankrupt's estate' see para 216 ante.
- 6 For the meaning of 'the earlier bankruptcy' see para 607 note 1 ante.
- 7 Insolvency Act 1986 ss 334(1), (3), 335(1). As to the transitional provisions applicable in the case of ss 334, 335 (as amended) see para 607 note 6 ante; and as to the application of ss 334, 335 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 607 note 6 ante.
- 8 See note 4 supra.
- 9 Insolvency Act 1986 s 335(2).
- 10 Ie in ibid s 335(1)-(3) (see supra; and para 609 post) and in s 334 (see para 607 ante).
- 11 Ie by virtue of ibid s 308 (personal property of the bankrupt exceeding a reasonable replacement value: see para 392 ante) or s 308A (as added) (vesting in trustee of certain tenancies: see para 393 ante).
- 12 Ibid s 335(4) (amended by the Housing Act 1988 s 140(1), Sch 17 para 74).
- 13 Insolvency Act 1986 s 335(5).
- 14 Ie under ibid s 335(5): see supra.
- 15 Ibid s 335(6).

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(13) DISTRIBUTION OF BANKRUPT'S ESTATE/ (iv) Second Bankruptcy/609. Expenses of trustees of earlier estate.

#### 609. Expenses of trustees of earlier estate.

Anything comprised in a bankrupt's estate by virtue of the above provisions<sup>1</sup> is so comprised subject to a first charge in favour of the existing trustee<sup>2</sup> for any bankruptcy expenses incurred by him in relation thereto<sup>3</sup>. Any expenses so incurred by the existing trustee<sup>4</sup> must be defrayed out of, and are a charge on:

- 772 (1) any property which is vested in the existing trustee as after-acquired property<sup>5</sup>;
- 773 (2) any money paid to the existing trustee in pursuance of an income payments order<sup>6</sup>; and
- 774 (3) any property or money which is, or in the hands of the existing trustee represents, the proceeds of sale or application of property or money falling within head (1) or head (2) above,

whether in the hands of the existing trustee or of the trustee for the purposes of the later bankruptcy<sup>7</sup>.

1 le by virtue of the Insolvency Act 1986 s 335(1) or (2): see para 608 ante.

2 For the meaning of 'the existing trustee' see para 607 note 1 ante.

3 Insolvency Act 1986 s 335(3). As to the transitional provisions applicable in the case of s 335 (as amended) see para 607 note 6 ante; and as to the application of s 335 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 607 note 6 ante.

4 le in compliance with *ibid* s 335(1) (see para 608 ante) or the Insolvency Rules 1986, SI 1986/1925, rr 6.225-6.228 (see *infra*; and para 471 ante).

5 le under the Insolvency Act 1986 s 307(3): see para 446 ante.

6 le under *ibid* s 310 (as amended): see para 449 ante.

7 Insolvency Rules 1986, SI 1986/1925, r 6.228.

## UPDATE

### 573-609 Distribution of bankrupt's estate

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/A. IN GENERAL/610. Grounds for annulment.

## (14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE

### (i) Annulment of Bankruptcy Order

#### A. IN GENERAL

#### 610. Grounds for annulment.

The court may annul a bankruptcy order if it at any time appears to the court:

775 (1) that, on any grounds existing at the time the order was made, the order ought not to have been made<sup>1</sup>; or

776 (2) that, to the extent required by the Insolvency Rules 1986<sup>2</sup>, the bankruptcy debts<sup>3</sup> and the expenses of the bankruptcy<sup>4</sup> have all, since the making of the order, been either paid or secured for to the satisfaction of the court<sup>5</sup>.

The court may annul a bankruptcy order whether or not the bankrupt has been discharged from the bankruptcy<sup>6</sup>.

Where the creditors' meeting summoned to consider a proposal for a voluntary arrangement<sup>7</sup> approves the arrangement, with or without modifications, and the debtor is an undischarged bankrupt, the court may either annul the bankruptcy order by which he was adjudged bankrupt or give such directions with respect to the conduct of the bankruptcy and the administration of the bankrupt's estate as it thinks appropriate for facilitating the implementation of the approved voluntary arrangement<sup>8</sup>.

1 See para 611 post.

2 le by the Insolvency Rules 1986, SI 1986/1925 (as amended).

3 For the meaning of 'bankruptcy debt' see para 491 ante.

4 See para 574 ante.

5 Insolvency Act 1986 s 282(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 282(1) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 11. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

6 Insolvency Act 1986 s 282(3).

7 le under ibid s 257: see para 97 ante.

8 See ibid s 261(1); and para 107 ante.

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 610 Grounds for annulment

NOTE 5--'Paid' in the 1986 Act s 282(1)(b) does not embrace the giving of security for a debt: *Halabi v Camden LBC* [2008] EWHC 322 (Ch), [2008] BPIR 370. See also *Revenue and Customs Comrs v Cassells* [2008] EWHC 3180 (Ch), [2009] STC 1047; *Official Receiver v McKay* [2009] EWCA Civ 467, [2010] 2 WLR 891, [2009] All ER (D) 144 (Jun).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/A. IN GENERAL/611. Orders which ought not to have been made.

### 611. Orders which ought not to have been made.

A bankruptcy order made in respect of a debt on which the petition was founded and which did not exist at the date of the order or was otherwise unenforceable against the debtor may be annulled<sup>1</sup>. A bankruptcy order made in proceedings which are an abuse of the process of the court may also be annulled<sup>2</sup>, as may an order made under a defective petition which has not been amended before the making of the bankruptcy order<sup>3</sup>, or on evidence relating to the debtor which was untrue<sup>4</sup>, or where the debtor was dead at the time when bankruptcy



proceedings were taken against him<sup>5</sup>, or where the debtor was a minor and the debt was not enforceable against the debtor<sup>6</sup>. The grounds on which the order ought not to have been made must have been existing at the time the bankruptcy order was made<sup>7</sup>.

1 *Royal Bank of Scotland v Farley* [1996] BPIR 638, CA.

2 *Re Painter, ex p Painter* [1895] 1 QB 85; *Re A Debtor (No 17 of 1966), ex p Debtor v Allen* [1967] Ch 590, [1967] 1 All ER 668, DC. As to when a petition is an abuse of the process of the court see paras 185, 194 ante. In the case of a bankruptcy order made on a debtor's petition, the order may be annulled if it was obtained as a device to defeat a claim against the debtor: *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA; *F v F (Divorce: Annulment of Bankruptcy Order)* [1994] 2 FCR 689, sub nom *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)* [1994] 1 FLR 359. Where the debtor has been misled into not attending the hearing of the petition at which a bankruptcy order is made, the court may annul the order regardless of the strength of the debtor's opposition to the petition: see *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695.

3 *Re Skelton, ex p Coates* (1877) 5 ChD 979, CA (decided under the Bankruptcy Act 1869 (repealed) where the bankruptcy order was made in the debtor's absence). See also *Re Fiddian, Squire & Co* (1892) 9 Morr 95, CA (where the court allowed an amendment and re-service of the petition before an order was made).

4 See *Re Bright, ex p Wingfield and Blew* [1903] 1 KB 735.

5 *Re Stanger, ex p Geisel* (1882) 22 ChD 436, CA (decided under the Bankruptcy Act 1869 (repealed)). As to the administration in bankruptcy of the insolvent estates of deceased persons see para 823 et seq post. If a debtor dies before service of the petition, the court may order service to be effected on his personal representatives, or on such other persons as it thinks fit: see the Insolvency Rules 1986, SI 1986/1925, r 6.16; and para 173 ante.

6 *Re Davenport, ex p Bankrupt v Eric Street Properties Ltd* [1963] 2 All ER 850, [1963] 1 WLR 817, CA, as explained in *Re Noble (a bankrupt), ex p Bankrupt v Official Receiver* [1965] Ch 129, [1964] 2 All ER 522, CA.

7 See the Insolvency Act 1986 s 282(1)(a); and para 610 head (1) ante. The court may, however, take into account evidence subsequently filed relating to the state of affairs existing at the date of the bankruptcy order: see *Re Dunn, ex p Official Receiver v Dunn* [1949] Ch 640, [1949] 2 All ER 388, CA. The court may also inquire behind a judgment, even though there was no application to set aside the judgment effective at the time when the bankruptcy order was made: *Royal Bank of Scotland v Farley* [1996] BPIR 638, CA.

The court also has a parallel jurisdiction to rescind a bankruptcy order on evidence of a significant change of circumstances following the making of the order: see the Insolvency Act 1986 s 375(1) (cited in para 739 post); and *Fitch v Official Receiver* [1996] 1 WLR 242, CA.

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 611 Orders which ought not to have been made

NOTE 4--See *Paulin v Paulin* [2009] EWCA Civ 221, [2009] 2 FCR 477 (motives in procuring order, based on substantially dishonest statement of affairs, militated in favour of exercising discretion to annul it).

OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/A. IN GENERAL/612. Debts and expenses paid in full.

## **612. Debts and expenses paid in full.**

'Payment in full' means payment in cash to the amount of 100 pence in the pound on all bankruptcy debts<sup>1</sup> proved<sup>2</sup> in the bankruptcy, together with interest<sup>3</sup> from the date of the bankruptcy order<sup>4</sup>, in so far as the assets in the bankruptcy are sufficient to pay it<sup>5</sup>.

The court may decline to annul a bankruptcy order where the bankrupt has paid off all proved debts but there are known to be creditors who have not proved and are unpaid<sup>6</sup>.

The assent of the creditors to an annulment of the bankruptcy by having given to the bankrupt absolute release will not of itself be sufficient to entitle the bankrupt to have the bankruptcy annulled<sup>7</sup>.

If a debt is disputed, or a creditor who has proved can no longer be traced, the bankrupt must have given such security, in the form of money paid into court, or a bond entered into with approved sureties, as the court considers adequate to satisfy any sum that may subsequently be proved to be due to the creditor concerned and, if the court thinks fit, costs<sup>8</sup>. Where security has been so given in the case of an untraced creditor, the court may direct that particulars of the alleged debt, and the security, be advertised in such manner as it thinks fit<sup>9</sup>. If advertisement is so ordered, and no claim on the security is made within 12 months from the date of the advertisement, or the first advertisement, if more than one, the court must, on application in that behalf, order the security to be released<sup>10</sup>.

The annulment of the bankruptcy order on the ground that the bankruptcy debts and expenses have been paid in full or secured to the satisfaction of the court is in the court's discretion<sup>11</sup>; and, even where the debts are paid in full, an order of annulment may be refused where the bankrupt has been guilty of misconduct in relation to his affairs<sup>12</sup>.

1 For the meaning of 'bankruptcy debt' see para 491 ante. Interest provable under the Insolvency Act 1986 s 322(2) (see para 545 ante) is a bankruptcy debt: see s 382(1)(d); and para 491 head (4) ante.

2 As to proofs of debt see para 490 et seq ante.

3 Ie under the Insolvency Act 1986 s 328(5): see para 585 ante.

4 See *ibid* s 328(4); and para 585 ante.

5 An unconditional release of a debt is not equivalent to payment in full for these purposes: *Re Keet* [1905] 2 KB 666, CA; *Re Burnett, ex p Official Receiver* (1894) 1 Mans 89 (where W, a friend of the bankrupt, on his behalf took an assignment of the debts amounting to £1,600 for £140, and another friend on the like behalf paid W the full amount of the debts, which were then reassigned to the bankrupt; this was held not to be payment in full by the bankrupt). Where, however, a bankrupt has entered into a binding voluntary arrangement under the Insolvency Act 1986 Pt VIII (ss 252-263) (see para 81 et seq ante) and is subsequently made bankrupt on the petition of a creditor not bound by the arrangement, the debts comprised in the arrangement are to be treated as paid in full for the purposes of s 282(1)(b) (see para 610 head (2) ante): *Re McKeen (a debtor)* [1995] BCC 412.

It would seem that interest payable under the Insolvency Act 1986 s 328(4) is not required to be paid, in addition to the amount of the proved bankruptcy debt for principal and interest, since such interest is not a bankruptcy debt: see s 322(2); and para 545 ante. If, however, the bankrupt's estate does contain a surplus after the payment of all bankruptcy debts, such interest will be payable out of the surplus before it is transferred to the bankrupt: see s 328(4).

6 *Re Robertson (a bankrupt)* [1989] 1 WLR 1139. Creditors who have not proved their debts at the date of the filing of an application to annul must be given notice of the hearing and afforded an opportunity to prove: *Re Robertson (a bankrupt)* supra. As to the giving of notice to creditors who have not proved see para 618 post.

7 *Re Gyll, ex p Board of Trade* (1888) 5 Morr 272; *Re Hester, ex p Hester* (1889) 22 QBD 632, CA; *Re Dixon and Cardus, ex p Dixon and Cardus* (1888) 5 Morr 291; and see *Re A Debtor (No 12 of 1970), ex p Official*

*Receiver v Debtor* [1971] 1 All ER 504, [1971] 1 WLR 261, DC; affd [1971] 2 All ER 1494, [1971] 1 WLR 1212, CA.

8 See the Insolvency Rules 1986, SI 1986/1925, r 6.211(3); and para 620 post. In the case of a disputed bankruptcy debt, time begins to run for the purposes of the Limitation Act 1980 from the date of the annulment; and time ceases to run for limitation purposes on the making of a bankruptcy order (see para 502 ante), but only in respect of debts provable in the bankruptcy, and not in respect of the creditor's right to pursue other remedies: *Re Benzon, Bower v Chetwynd* [1914] 2 Ch 68 at 75, 76, CA; *Cotterell v Price* [1960] 3 All ER 315, [1960] 1 WLR 1097. It will be in exceptional cases only that there are other remedies in respect of which time will continue to run for limitation purposes.

9 See the Insolvency Rules 1986, SI 1986/1925, r 6.211(4); and para 620 post. It would seem that time does not run for limitation purposes while the debt is secured, by payment into court or otherwise: see *Re Dennis, ex p Dennis* [1895] 2 QB 630.

10 See the Insolvency Rules 1986, SI 1986/1925, r 6.211(4).

11 See the Insolvency Act 1986 s 282(1); and para 610 ante.

12 *Re Taylor, ex p Taylor* [1901] 1 KB 744, DC; *Re Keet* [1905] 2 KB 666, CA; and see *Re A Debtor (No 37 of 1976), ex p Taylor v Debtor* [1980] Ch 565, [1980] 1 All ER 129, DC.

Where the bankrupt has concealed assets from his trustee and is in any event likely to be soon made bankrupt a second time, an annulment will be refused: *Re a Bankrupt (No 622 of 1995), Artman v Artman* [1996] BPIR 511.

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/A. IN GENERAL/613. Annulment of bankruptcy order where criminal bankruptcy order in force.

### 613. Annulment of bankruptcy order where criminal bankruptcy order in force.

The court may annul a bankruptcy order made against an individual on a petition presented by one of the individual's creditors or jointly by more than one of them<sup>1</sup>, by the individual himself<sup>2</sup> or by the supervisor of, or any person, other than the individual, who is for the time being bound by, a voluntary arrangement<sup>3</sup> proposed by the individual and approved under Part VIII of the Insolvency Act 1986, if at any time it appears to the court, on an application by the Official Petitioner<sup>4</sup>:

777 (1) that the petition was pending at a time when a criminal bankruptcy order<sup>5</sup> was made against the individual or was presented after such an order was so made; and

778 (2) no appeal is pending<sup>6</sup> against the individual's conviction of any offence by virtue of which the criminal bankruptcy order was made<sup>7</sup>.

1 ie under the Insolvency Act 1986 s 264(1)(a): see para 124 head (1) ante.

2 ie under ibid s 264(1)(b): see para 124 head (2) ante.

- 3    le under *ibid* s 264(1)(c): see para 124 head (3) ante.
- 4    As to the Official Petitioner see para 845 post.
- 5    As to criminal bankruptcy orders see para 847 et seq post.
- 6    le within the meaning of the Insolvency Act 1986 s 277(3): see para 215 note 3 ante. As to the prospective repeal of s 277 see para 844 note 2 post.
- 7    See *ibid* s 282(2); and para 852 post. As to the prospective repeal of s 282(2) see para 844 note 2 post.

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in **PARA 2 NOTE 5**.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/A. IN GENERAL/614. Annulment of criminal bankruptcy order.

#### **614. Annulment of criminal bankruptcy order.**

The court must annul a bankruptcy order made on a petition presented by the Official Petitioner or any person specified in an order in pursuance of the Powers of Criminal Courts Act 1973<sup>1</sup>, if at any time it appears to the court that the criminal bankruptcy order on which the petition was based has been rescinded in consequence of an appeal<sup>2</sup>.

1    le under the Insolvency Act 1986 s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 post; and as to the repeal of the Powers of Criminal Courts Act 1973 s 39 (as amended) see para 844 note 1 post.

2    See *ibid* s 282(2); and para 852 post. As to the prospective repeal of s 282(2) see para 844 note 2 post.

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in **PARA 2 NOTE 5**.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/B. PROCEDURE/615. Application for annulment.

## **B. PROCEDURE**

## 615. Application for annulment.

An application to the court for the annulment of a bankruptcy order<sup>1</sup> must specify whether it is made on the grounds that:

- 779 (1) it ought not to have been made<sup>2</sup>; or
- 780 (2) the debts and expenses of the bankrupt have all been paid or secured<sup>3</sup>.

In either case, the application must be supported by an affidavit<sup>4</sup> stating the grounds on which it is made; and, where it is made under head (2) above, there must be set out in the affidavit all the facts by reference to which the court is required to be satisfied before annulling the bankruptcy order<sup>5</sup>.

A copy of the application and supporting affidavit must be filed in court<sup>6</sup>; and the court must give to the applicant notice of the venue<sup>7</sup> fixed for the hearing<sup>8</sup>.

The applicant must give to the official receiver and, if other, the trustee notice of the venue, accompanied by copies of the application and the affidavit:

- 781 (a) where the application is made on the grounds specified in head (1) above, in sufficient time to enable them to be present at the hearing; and
- 782 (b) where the application is made on the grounds specified in head (2) above, not less than 28 days before the hearing<sup>9</sup>.

Where the application is made on the grounds specified in head (1) above, such provisions must additionally be complied with in relation to the person on whose petition the bankruptcy order was made<sup>10</sup>.

1 le under the Insolvency Act 1986 s 282(1): see para 610 ante.

2 le under ibid s 282(1)(a): see para 610 head (1) ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.206(1). The application for annulment under text head (2) supra is on the grounds specified in the Insolvency Act 1986 s 282(1)(b) (see para 610 head (2) ante): Insolvency Rules 1986, SI 1986/1925, r 6.206(1). Part 6 Ch 21 (rr 6.206-6.214 (as amended): see infra; and para 616 et seq post) applies to an application to the court under the Insolvency Act 1986 s 282(2) (annulment of bankruptcy order on criminal bankruptcy petition: see para 614 ante) as it applies to an application under s 282(1), with any necessary modifications: Insolvency Rules 1986, SI 1986/1925, r 6.234(3). See, however, para 844 note 2 post. Rules 6.206-6.212 (as amended) apply to an application for annulment under the Insolvency Act 1986 s 261 (see para 107 ante) as they apply to such an application under s 282(1)(a): Insolvency Rules 1986, SI 1986/1925, r 6.212A (added by SI 1987/1919).

4 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

5 Ibid r 6.206(2). As to the facts in respect of which the court is required to be satisfied see r 6.211; and para 620 post.

6 For the meaning of 'file in court' see para 95 note 10 ante.

7 For the meaning of 'venue' see para 84 note 21 ante.

8 Insolvency Rules 1986, SI 1986/1925, r 6.206(3).

9 Ibid r 6.206(4) (amended by SI 1987/1919).

10 Insolvency Rules 1986, SI 1986/1925, r 6.206(5) (added by SI 1987/1919).

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **615 Application for annulment**

TEXT AND NOTES--SI 1986/1925 r 6.206(6) added: SI 2003/1730.

NOTE 3--SI 1986/1925 r 6.212A revoked: SI 2003/1730.

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### **616. Report by trustee.**

Where the application for the annulment of a bankruptcy order is made on the grounds that the debts and expenses of the bankruptcy have all been paid or secured<sup>1</sup>, then, not less than 21 days before the date fixed for the hearing, the trustee, or, if no trustee has been appointed, the official receiver, must file in court<sup>2</sup> a report with respect to the following matters:

- 783 (1) the circumstances leading to the bankruptcy;
- 784 (2) in summarised form, the extent of the bankrupt's assets and liabilities at the date of the bankruptcy order and at the date of the present application;
- 785 (3) details of creditors, if any, who are known to have claims, but have not proved; and
- 786 (4) such other matters as the person making the report considers to be, in the circumstances, necessary for the information of the court<sup>3</sup>.

The report must include particulars of the extent, if any, to which, and the manner in which, the debts and expenses of the bankruptcy have been paid or secured; and, in so far as debts and expenses are unpaid but secured, the person making the report must state in it whether, and to what extent, he considers the security to be satisfactory<sup>4</sup>.

A copy of the report must be sent to the applicant at least 14 days before the date fixed for the hearing; and he may, if he wishes, file further affidavits<sup>5</sup> in answer to statements made in the report<sup>5</sup>. Copies of any such affidavits must be sent by the applicant to the official receiver and, if other, the trustee<sup>6</sup>. If the trustee is other than the official receiver, a copy of his report must be sent to the official receiver at least 21 days before the hearing; and the official receiver may then file an additional report, a copy of which must be sent to the applicant at least seven days before the hearing<sup>7</sup>.

1 le under the Insolvency Act 1986 s 282(1)(b): see para 610 head (2) ante.

2 For the meaning of 'file in court' see para 95 note 10 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.207(1), (2). 'Such other matters' presumably includes the conduct of the bankrupt during the proceedings: cf the Bankruptcy Rules 1952, SI 1952/2113, r 184(1) (revoked).

4 Insolvency Rules 1986, SI 1986/1925, r 6.207(1), (3). For the prescribed fee where the report is filed by the official receiver see the Insolvency Fees Order 1986, SI 1986/2030, art 4, Schedule Pt II, Fee 7 (substituted by SI 1991/496).

5 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

6 Ibid r 6.207(1), (4).

7 Ibid r 6.207(1), (5). As to the hearing see para 619 post.

## UPDATE

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **616 Report by trustee**

TEXT AND NOTES--See SI 1986/1925 r 6.207A (applicant's claim that remuneration is or expenses are excessive) (added by SI 2010/686).

NOTE 4--SI 1986/2030 replaced: Insolvency Proceedings (Fees) Order 2004, SI 2004/593 (amended by SI 2005/544, SI 2006/561, SI 2007/521, SI 2008/714, SI 2009/645). A general administration fee, Fee B1, is now payable to an official receiver in relation to the performance of his duties on the making of a bankruptcy order: see SI 2004/593 Sch 2 para 2 (amended by SI 2007/521).

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### **617. Power of court to stay proceedings.**

In advance of the hearing, the court may make an interim order staying any proceedings which it thinks ought, in the circumstances of the application, to be stayed<sup>1</sup>.

Except in relation to an application for an order staying all or any part of the proceedings in the bankruptcy, application for such an order may be made without notice being served on any other party<sup>2</sup>.

Where application is made for such an order staying all or any part of the proceedings in the bankruptcy, the applicant must send copies of the application to the official receiver and, if other, the trustee in sufficient time to enable them to be present at the hearing and, if they wish to do so, make representations<sup>3</sup>.

Where the court makes an order staying all or any part of the proceedings in the bankruptcy, the statutory provisions<sup>4</sup> nevertheless continue to apply to any application for, or other matters in connection with, the annulment of the bankruptcy order<sup>5</sup>.

If the court makes an order under the above provisions, it must send copies of the order to the applicant, the official receiver and, if other, the trustee<sup>6</sup>.

1 Insolventcy Rules 1986, SI 1986/1925, r 6.208(1).

2 Ibid r 0.2(2) (substituted by SI 1999/1022); Insolventcy Rules 1986, SI 1986/1925, r 6.208(2) (substituted by SI 1987/1919).

3 Insolventcy Rules 1986, SI 1986/1925, r 6.208(3) (added by SI 1987/1919).

4 Ie the Insolventcy Rules 1986, SI 1986/1925, rr 6.206-6.214 (as amended).

5 Ibid r 6.208(4) (added by SI 1987/1919).

6 Insolventcy Rules 1986, SI 1986/1925, r 6.208(5) (added by SI 1987/1919).

## UPDATE

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **617 Power of court to stay proceedings**

NOTE 2--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

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### **618. Notice to creditors who have not proved.**

Where the application for annulment is made on the grounds that the debts and expenses of the bankruptcy have all been paid or secured<sup>1</sup>, and it has been reported to the court<sup>2</sup> that there are known creditors of the bankrupt who have not proved, the court may:

787 (1) direct the trustee or, if no trustee has been appointed, the official receiver, to send notice of the application to such of those creditors as the court thinks ought to be informed of it, with a view to their proving their debts<sup>3</sup>, if they so wish, within 21 days; and

788 (2) direct the trustee or, if no trustee has been appointed, the official receiver, to advertise the fact that the application has been made, so that creditors who have not proved may do so within a specified time; and

789 (3) adjourn the application meanwhile, for any period not less than 35 days<sup>4</sup>.

1 Ie under the Insolventcy Act 1986 s 282(1)(b): see para 610 head (2) ante.

2 Ie under the Insolventcy Rules 1986, SI 1986/1925, r 6.207: see para 616 ante.

3 As to proofs of debt see para 490 et seq ante.



4 Insolvency Rules 1986, SI 1986/1925, r 6.209 (amended by SI 1987/1919). See also *Re Robertson (a bankrupt)* [1989] 1 WLR 1139; and para 612 text and note 12 ante.

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 619. The hearing.

The trustee must attend the hearing of the application<sup>1</sup>; and the official receiver, if he is not the trustee, may attend, but is not required to do so unless he has filed<sup>2</sup> a report<sup>3</sup>. If the court makes an order on the application, it must send copies of the order to the applicant, the official receiver and, if other, the trustee<sup>4</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.210(1).

2 *Ibid* r 6.207: see para 616 ante.

3 *Ibid* r 6.210(2). For the prescribed fee where the official receiver attends the hearing see the Insolvency Fees Order 1986, SI 1986/2030, art 4, Schedule Pt II, Fee 7 (substituted by SI 1991/496).

4 Insolvency Rules 1986, SI 1986/1925, r 6.210(3). For the prescribed form of order of annulment under the Insolvency Act 1986 s 282 see the Insolvency Rules 1986, SI 1986/1925, rr 6.210, 12.7(1), (2), Sch 4, Form 6.71 (amended by SI 1991/495).

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 619 The hearing

NOTE 3--SI 1986/2030 replaced: Insolvency Proceedings (Fees) Order 2004, SI 2004/593 (amended by SI 2005/544, SI 2006/561, SI 2007/521, SI 2008/714, SI 2009/645). A general administration fee, Fee B1, is now payable to an official receiver in relation to the performance of his duties on the making of a bankruptcy order: see SI 2004/593 Sch 2 para 2 (amended by SI 2007/521).

NOTE 4--SI 1986/1925 Sch 4, Form 6.71 substituted: SI 2004/584. SI 1986/1925 Sch 4 Form 6.71 amended: SI 2009/642.

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## **620. Matters to be proved where debts and expenses paid or secured.**

The following provisions apply with regard to the matters which must be proved to the satisfaction of the court in an application for the annulment of a bankruptcy order<sup>1</sup> on the grounds that the debts and expenses of the bankruptcy have all been paid or secured<sup>2</sup>.

All bankruptcy debts<sup>3</sup> which have been proved must have been paid in full<sup>4</sup>. If, however, a debt is disputed, or a creditor who has proved can no longer be traced, the bankrupt must have given such security, in the form of money paid into court, or a bond entered into with approved sureties, as the court considers adequate to satisfy any sum that may subsequently be proved to be due to the creditor concerned and, if the court thinks fit, costs<sup>5</sup>. Where security has been so given in the case of an untraced creditor, the court may direct that particulars of the alleged debt, and the security, be advertised in such manner as it thinks fit; and, if advertisement is so ordered, and no claim on the security is made within 12 months from the date of the advertisement, or the first advertisement, if more than one, the court must, on application in that behalf, order the security to be released<sup>6</sup>.

1 le under the Insolvency Act 1986 s 282(1)(b): see para 610 head (2) ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.211(1).

3 For the meaning of 'bankruptcy debt' see para 491 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.211(2). For the meaning of 'payment in full' see para 612 ante. As to proofs of debt see para 490 et seq ante.

5 Ibid r 6.211(3).

6 Ibid r 6.211(4).

### **UPDATE**

#### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **620 Matters to be proved where debts and expenses paid or secured**

NOTE 6--See *Howard v Savage* [2006] EWHC 3693 (Ch), [2007] BPIR 1097.

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OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/B. PROCEDURE/621. Notice to creditors.

### **621. Notice to creditors.**

Where the official receiver has notified creditors of the debtor's bankruptcy, and the bankruptcy order is annulled, he must forthwith notify them of the annulment<sup>1</sup>.

Expenses incurred by the official receiver in giving such notice are a charge in his favour on the property of the former bankrupt, whether or not actually in his hands<sup>2</sup>.

Where any property is in the hands of a trustee or any person other than the former bankrupt himself, the official receiver's charge is valid subject only to any costs that may be incurred by the trustee or that other person in effecting realisation of the property for the purpose of satisfying the charge<sup>3</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.212(1).

2 Ibid r 6.212(2).

3 Ibid r 6.212(3).

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/B. PROCEDURE/622. Other matters arising on annulment.

### **622. Other matters arising on annulment.**

In an order annulling a bankruptcy order<sup>1</sup>, the court must include provision permitting vacation of the registration of the bankruptcy petition as a pending action<sup>2</sup>, and of the bankruptcy order<sup>3</sup>, in the register of writs and orders affecting land<sup>4</sup>.

The court must forthwith give notice of the making of the order to the Secretary of State<sup>5</sup>.

The former bankrupt may require the Secretary of State to give notice of the making of the order in the Gazette<sup>6</sup>, or in any newspaper in which the bankruptcy order was advertised, or in both<sup>7</sup>. Any such requirement by the former bankrupt must be addressed to the Secretary of State in writing; and the Secretary of State must notify him forthwith as to the cost of the advertisement<sup>8</sup>, and is under no obligation to advertise until that sum has been paid<sup>9</sup>.

1 ie under the Insolvency Act 1986 s 261 (see para 107 ante) or s 282 (see para 610 ante).

2 ie under the Insolvency Rules 1986, SI 1986/1925, r 6.13 (see para 167 ante) and r 6.43 (see para 193 ante).

- 3 le under *ibid* r 6.34(2)(a) (see paras 198 head (1) ante) and r 6.46(2)(a) (see para 204 head (1) ante).
- 4 *Ibid* r 6.213(1) (amended by SI 1987/1919).
- 5 Insolvency Rules 1986, SI 1986/1925, r 6.213(2).
- 6 For the meaning of 'the Gazette' see para 171 note 5 ante.
- 7 Insolvency Rules 1986, SI 1986/1925, r 6.213(3). Where the former bankrupt has died, or is a person incapable of managing his affairs, within the meaning of rr 7.43-7.46 (see para 815 post), the references to him in r 6.213(3) and r 6.213(4) (see *infra*) are to be read as referring to the personal representative, or, as the case may be, a person appointed by the court to represent or act for him: r 6.213(5).
- 8 For the prescribed cost of the advertisement see the Insolvency Fees Order 1986, SI 1986/2030, art 4, Schedule Pt II, Fee 10 (amended by SI 1988/95).
- 9 Insolvency Rules 1986, SI 1986/1925, r 6.213(4). See also note 7 *supra*.

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 622 Other matters arising on annulment

NOTE 4--SI 1986/1925 r 6.213(1) amended: SI 2003/1730.

TEXT AND NOTES 6, 7--SI 1986/1925 r 6.213(3) substituted: SI 2009/642.

NOTES 7, 9--SI 1986/1925 r 6.213(4) amended: SI 2004/584.

NOTE 8--SI 1986/2030 replaced: Insolvency Proceedings (Fees) Order 2004, SI 2004/593 (amended by SI 2005/544, SI 2006/561, SI 2007/521, SI 2008/714, SI 2009/645). A general administration fee, calculated as a percentage of total chargeable receipts relating to the bankruptcy, is now payable in respect of the performance by the Secretary of State of her duties in relation to the administration of the estate of a bankrupt: see SI 2004/593 Sch 2 para 2 Fee B2 (amended by SI 2009/645).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/C. EFFECT OF ANNULMENT OF BANKRUPTCY ORDER/623. Effect of annulment on petition and bankruptcy order.

## ***C. EFFECT OF ANNULMENT OF BANKRUPTCY ORDER***

### **623. Effect of annulment on petition and bankruptcy order.**

The order of annulment<sup>1</sup> orders that the bankruptcy order be annulled and that the petition on which it is made be dismissed<sup>2</sup>. The court must include in such an order provision permitting vacation of the registration of the bankruptcy petition as a pending action<sup>3</sup>, and of the bankruptcy order<sup>4</sup>, in the register of writs and orders affecting land<sup>5</sup>.

- 1 le under the Insolvency Act 1986 s 261 (see para 107 ante) or s 282 (see para 610 ante).
- 2 For the prescribed form of order of annulment see the Insolvency Rules 1986, SI 1986/1925, rr 6.210, 12.7(1), (2), Sch 4, Form 6.71 (amended by SI 1991/495).
- 3 le under the Insolvency Rules 1986, SI 1986/1925, r 6.13 (see para 167 ante) and r 6.43 (see para 193 ante).
- 4 le under ibid r 6.34(2)(a) (see paras 198 head (1) ante) and r 6.46(2)(a) (see para 204 head (1) ante).
- 5 Ibid r 6.213(1) (amended by SI 1987/1919).

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **623 Effect of annulment on petition and bankruptcy order**

NOTE 2--SI 1986/1925 Sch 4, Form 6.71 substituted: SI 2004/584. SI 1986/1925 Sch 4 Form 6.71 amended: SI 2009/642.

NOTE 5--SI 1986/1925 r 6.213 amended: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/C. EFFECT OF ANNULMENT OF BANKRUPTCY ORDER/624. Effect of annulment on property and rights.

### **624. Effect of annulment on property and rights.**

Where the court annuls a bankruptcy order<sup>1</sup>:

- 790 (1) any sale or other disposition of property, payment made or other thing duly done under any provision in the Insolvency Act 1986<sup>2</sup>, by or under the authority of the official receiver or a trustee of the bankrupt's estate or by the court is valid<sup>3</sup>; but
- 791 (2) if any of the bankrupt's estate is then vested in such a trustee<sup>4</sup>, it vests in such person as the court may appoint or, in default of any such appointment, reverts to the bankrupt on such terms, if any, as the court may direct;

and the court may include in its order such supplemental provisions as may be authorised<sup>5</sup> by the Insolvency Rules 1986<sup>6</sup>. In the absence of such provisions by the court, the debtor would appear to be remitted to his original rights in respect of his property<sup>7</sup>.

An annulment order made on the ground that all the debts have been paid in full creates an estoppel by record, so that a creditor cannot recover a debt for which he agreed not to prove<sup>8</sup>; but it does not debar a creditor, who has merely abstained from proving, from suing the debtor after the annulment, his right to sue no longer being suspended by the bankruptcy<sup>9</sup>.

Annulment will remove the various disqualifications to which a bankrupt is subject<sup>10</sup>.

- 1   le whether under the Insolvency Act 1986 s 261 (see para 107 ante) or s 282 (see para 610 ante).
- 2   le under any provision in ibid Pts VIII-XI (ss 252-385) (as amended).
- 3   This would appear to cover such acts as the rejection of a proof by the trustee, so that the claim for the debt which was the subject of the proof may not be enforceable after annulment: *Brandon v McHenry* [1891] 1 QB 538, CA; and see *Seaton v Deerpurth* [1895] 1 QB 853, CA.
- 4   See note 2 supra.
- 5   le under the Insolvency Rules 1986, SI 1986/1925 (as amended).
- 6   Insolvency Act 1986 s 282(4). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 282(4) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 11. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.
- 7   See *Bailey v Johnson* (1872) LR 7 Exch 263 (decided under the Bankruptcy Act 1869 s 81 (repealed), where the debtor after annulment was allowed to set off against the claim of the petitioning creditors' trustee (bankers who had themselves become bankrupt) the amount of the proceeds of the sale of the debtor's estate paid into their bank). See also *Re Chidley, Re Lennard* (1875) 1 ChD 177, CA; *West v Baker* (1875) 1 ExD 44 (both decided under the Bankruptcy Act 1869 (repealed), where, after annulment for the purposes of composition proceedings, the debtor's property became vested in a person other than the debtor). In the former case, that person held it discharged from an execution which would have been invalid in bankruptcy; in the latter a debt provable in bankruptcy was allowed to be set off against a demand for a debt due to the debtor. See also *Re Simons, ex p Allard* (1881) 16 ChD 505, CA and *Re Croom, England v Provincial Assets Co* [1891] 1 Ch 695 (where the annulment was followed by a scheme); *Re Newman, ex p Official Receiver* [1899] 2 QB 587 (where the receiving order against the trustee in bankruptcy was rescinded).
- 8   *John v Mendoza* [1939] 1 KB 141, [1938] 4 All ER 472.
- 9   *More v More* [1962] Ch 424, [1962] 1 All ER 125, applying *Brandon v McHenry* [1891] 1 QB 538, CA, and declining to follow *John v Mendoza* [1939] 1 KB 141, [1938] 4 All ER 472. As to the suspension of the creditors' remedies in bankruptcy see the Insolvency Act 1986 s 285; and para 218 ante.
- 10   See para 697 et seq post.

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 624 Effect of annulment on property and rights

NOTE 1--The provisions also apply in relation to an annulment under the Insolvency Act 1986 s 263D (see PARA 123A): s 282(4) (amended by the Enterprise Act 2002 Sch 23 para 4(a)).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/C. EFFECT OF ANNULMENT OF BANKRUPTCY ORDER/625. Effect of annulment on forfeitures.

### 625. Effect of annulment on forfeitures.

In the case of a gift by will or settlement of rent or other income to a donee defeasible on its becoming payable to some other person, the forfeiture takes effect, notwithstanding annulment of a bankruptcy order, if before the annulment it becomes the duty of the trustees of the will or settlement to make a payment which, but for the forfeiture clause, the trustee in bankruptcy of the donee would be entitled to receive<sup>1</sup>. In such a case the trustee need not have actually claimed the income<sup>2</sup>. If, however, the annulment order is made, or if, though the order is not actually made, there are circumstances which entitle the donee to claim it as a matter of right<sup>3</sup> before any income becomes payable, there will be no forfeiture<sup>4</sup>. The principle is that the annulment will be in time to save forfeiture if it takes place before any income becomes payable to the beneficiary, but not if it takes place after the trustees have received income which may properly be treated as payable to or as retained or appropriated for the beneficiary<sup>5</sup>.

Where, by a lease, there is a right of re-entry on bankruptcy, it is doubtful whether an action to enforce that right could be defeated by an annulment of the bankruptcy order after the action has begun<sup>6</sup>; but it is submitted that the right to enforce the forfeiture which has already arisen would not be defeated<sup>7</sup>.

1 *Re Parnham's Trusts* (1872) LR 13 Eq 413; *Robertson v Richardson* (1885) 30 ChD 623; *Metcalf v Metcalfe* (1889) 43 ChD 633 (affd [1891] 3 Ch 1, CA); *Re Loftus-Otway, Otway v Otway* [1895] 2 Ch 235; *Re Forder, Forder v Forder* [1927] 2 Ch 291.

2 *Robertson v Richardson* (1885) 30 ChD 623.

3 *Metcalf v Metcalfe* (1889) 43 ChD 633 at 642 (affd [1893] 3 Ch 1, CA); *Re Forder, Forder v Forder* [1927] 2 Ch 291, CA.

4 *White v Chitty* (1866) LR 1 Eq 372; *Lloyd v Lloyd* (1866) LR 2 Eq 722; *Trappes v Meredith* (1869) LR 9 Eq 299 (further proceedings (1870) LR 10 Eq 604; revsd 7 Ch App 248); *Re Parnham's Trust* (1876) 46 LJ Ch 80; *Samuel v Samuel* (1879) 12 ChD 152.

5 *Re Forder, Forder v Forder* [1927] 2 Ch 291 at 321, CA.

6 *Smith v Gronow* [1891] 2 QB 394.

7 Cf *Metcalf v Metcalfe* (1889) 43 ChD 633 (affd [1893] 3 Ch 1, CA); *Re Loftus-Otway, Otway v Otway* [1895] 2 Ch 235.

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/C. EFFECT OF ANNULMENT OF BANKRUPTCY ORDER/626. Effect of annulment on statute-barred rights.

### 626. Effect of annulment on statute-barred rights.

Since on annulment nothing reverts to the debtor which was not vested in the trustee, the debtor's rights to property will be barred by the Limitation Act 1980, if the trustee's rights had become so barred<sup>1</sup>.

1 *Markwick v Hardingham* (1880) 15 ChD 339, CA.

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/C. EFFECT OF ANNULMENT OF BANKRUPTCY ORDER/627. Effect of annulment on prosecutions.

#### **627. Effect of annulment on prosecutions.**

The provisions of the Insolvency Act 1986 relating to bankruptcy offences<sup>1</sup> apply whether or not the bankruptcy order is annulled, but proceedings for such an offence may not be instituted after the annulment<sup>2</sup>.

1 *I.e.* the Insolvency Act 1986 Pt IX Ch VI (ss 350-362): see para 697 et seq post.

2 *Ibid* s 350(2); and see para 707 post.

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(i) Annulment of Bankruptcy Order/C. EFFECT OF ANNULMENT OF BANKRUPTCY ORDER/628. Trustee's final account.

#### **628. Trustee's final account.**

Where a bankruptcy order is annulled<sup>1</sup>, this does not of itself release the trustee from any duty or obligation imposed on him<sup>2</sup> to account for all his transactions in connection with the former bankrupt's estate<sup>3</sup>. The trustee must submit a copy of his final account to the Secretary of



State, as soon as practicable after the court's order annulling the bankruptcy order, and he must file a copy of the final account in court<sup>4</sup>.

The final account must include a summary of the trustee's receipts and payments in the administration, and contain a statement to the effect that he has reconciled his account with that which is held by the Secretary of State in respect of the bankruptcy<sup>5</sup>.

The trustee is released from such time as the court may determine, having regard to whether the trustee has submitted his final account to the Secretary of State and filed a copy of it in court<sup>6</sup>, and any security given<sup>7</sup> has been, or will be, released<sup>8</sup>.

1 le under the Insolvency Act 1986 s 261 (see para 107 ante) or s 282 (see para 610 ante).

2 le by or under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

3 Ibid r 6.214(1) (amended by SI 1987/1919).

4 Insolvency Rules 1986, SI 1986/1925, r 6.214(2). For the meaning of 'file in court' see para 95 note 10 ante.

5 Ibid r 6.214(3). As to the account held by the Secretary of State see para 26 ante.

6 le under ibid r 6.214(2): see supra.

7 le under ibid r 6.211(3): see para 620 ante.

8 Ibid r 6.214(4).

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 628 Trustee's final account

NOTE 3--SI 1986/1925 r 6.214(1) amended: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(ii) Discharge of Bankruptcy Order/A. IN GENERAL/629. Discharge of bankruptcy order.

## (ii) Discharge of Bankruptcy Order

### A. IN GENERAL

#### 629. Discharge of bankruptcy order.

The bankruptcy of an individual against whom a bankruptcy order has been made commences with the day on which the order is made, and continues until the individual is discharged<sup>1</sup>. A bankrupt is discharged from bankruptcy:

- 792 (1) in the case of an individual who was adjudged bankrupt on a petition presented by the Official Petitioner or by a person specified in the order in pursuance of the Powers of Criminal Courts Act 1973<sup>2</sup> or who had been an undischarged bankrupt at any time<sup>3</sup> in the period of 15 years ending with the commencement of the bankruptcy, by an order of the court<sup>4</sup>; and
- 793 (2) in any other case, by the expiration of the relevant period<sup>5</sup>.

1 See the Insolvency Act 1986 s 278; and para 213 ante.

2 See under *ibid* s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 post; and as to the repeal of the Powers of Criminal Courts Act 1973 s 39 (as amended) see para 844 note 1 post.

3 In determining for these purposes whether a person was an undischarged bankrupt at any time, any time when he was a bankrupt by virtue of an order that was subsequently annulled is to be disregarded: Insolvency Act 1986 s 282(5).

4 See under *ibid* s 280: see para 630 post.

5 *Ibid* s 279(1). For the meaning of 'the relevant period' see para 631 post. Section 279 is without prejudice to any power of the court to annul a bankruptcy order: s 279(4).

Where a person was adjudged bankrupt before 29 December 1986 (see para 2 ante) or is adjudged bankrupt on or after that day on a petition presented before that day, and that person was not an undischarged bankrupt at any time in the period of 15 years ending with the adjudication, that person is deemed, if not previously discharged, to be discharged from his bankruptcy for the purposes of the Bankruptcy Act 1914 (repealed) at the end of the discharge period: Insolvency Act 1986 s 437, Sch 11 para 13(1). Subject to Sch 11 para 13(3) (see *infra*), the discharge period for these purposes is: (1) in the case of a person adjudged bankrupt before 29 December 1986, the period of three years beginning with that day; and (2) in the case of a person who is adjudged bankrupt on or after 29 December 1986 on a petition presented before that day, the period of three years beginning with the date of the adjudication: Sch 11 para 13(2). Where, however, the court exercising jurisdiction in relation to a bankruptcy to which these provisions apply is satisfied, on the application of the official receiver, that the bankrupt has failed, or is failing, to comply with any of his obligations under the Bankruptcy Act 1914 (repealed), any rules made under that Act or any such rules as are mentioned in the Insolvency Act 1986 Sch 11 para 19 (see para 2 note 5 ante), the court may order that the discharge period is to cease to run for such period, or until the fulfilment of such conditions, including a condition requiring the court to be satisfied as to any matter, as may be specified in the order: Sch 11 para 13(3).

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 629 Discharge of bankruptcy order

TEXT AND NOTES 2-5--A bankrupt is discharged from bankruptcy at the end of the period of one year beginning with the date on which the bankruptcy commences: 1986 Act s 279(1) (s 279 substituted by the Enterprise Act 2002 s 256). If before the end of that period the official receiver files with the court a notice stating that investigation of the conduct and affairs of the bankrupt under the 1986 Act s 289 (see PARA 256) is unnecessary or concluded, the bankrupt is discharged when the notice is filed: s 279(2). As to notices under s 279(2), see the Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 21A (r 6.214A) (amended by SI 2004/584), SI 1986/1925 Form 6.82 (added by SI 2003/1730). The 1986 Act s 279 is without prejudice to any power of the court to annul

a bankruptcy order: s 279(4). As to the discharge from criminal bankruptcy, see PARA 857.

NOTE 3--1986 Act s 282(5) repealed: 2002 Act Sch 23 para 4(b), Sch 26.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(ii) Discharge of Bankruptcy Order/A. IN GENERAL/630. Discharge by order of the court.

### **630. Discharge by order of the court.**

An application for an order of the court discharging an individual from bankruptcy in a case<sup>1</sup> where he was adjudged bankrupt on a petition by the Official Petitioner or by any person specified in the order in pursuance of the Powers of Criminal Courts Act 1973 or he had been an undischarged bankrupt at any time<sup>2</sup> in the period of 15 years ending with the commencement of the bankruptcy may be made by the bankrupt at any time after the end of the period of five years beginning with the commencement of the bankruptcy<sup>3</sup>. On such an application the court may:

- 794 (1) refuse to discharge the bankrupt from the bankruptcy;
- 795 (2) make an order discharging him absolutely; or
- 796 (3) make an order discharging him subject to such conditions with respect to any income which may subsequently become due to him, or with respect to property devolving on him, or acquired by him, after his discharge, as may be specified in the order<sup>4</sup>.

The court may provide for an order falling within head (2) or head (3) above to have immediate effect or to have its effect suspended for such period, or until the fulfilment of such conditions, including a condition requiring the court to be satisfied as to any matter, as may be specified in the order<sup>5</sup>.

1    Ie a case falling within the Insolvency Act 1986 s 279(1)(a): see para 629 head (1) ante. As to the procedure on such an application see para 636 et seq post.

2    In determining for these purposes whether a person was an undischarged bankrupt at any time, any time when he was a bankrupt by virtue of an order that was subsequently annulled is to be disregarded: *ibid* s 282(5).

3    *Ibid* s 280(1). As to the commencement of bankruptcy see para 213 ante; and as to the repeal of the Powers of Criminal Courts Act 1973 s 39 (as amended) see para 844 note 1 post.

4    Insolvency Act 1986 s 280(2). Section 280(2) confers a wide discretion, and the court no longer has the guidelines contained in the Bankruptcy Act 1914 s 26(3) (repealed). See also para 638 note 5 post.

5    Insolvency Act 1986 s 280(3).

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **630 Discharge by order of the court**

NOTE 1--Reference to the Insolvency Act 1986 s 279(1)(a) is now to s 279(6): s 280(1) (amended by the Enterprise Act 2002 Sch 23 para 3(a)) (see further PARA 857 TEXT AND NOTE 2).

TEXT AND NOTE 3--For 'commencement of the bankruptcy' read 'date on which the bankruptcy commences': 1986 Act s 280(1) (amended by the 2002 Act Sch 23 para 3(b)).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(ii) Discharge of Bankruptcy Order/A. IN GENERAL/631. Automatic discharge; the relevant period.

#### **631. Automatic discharge; the relevant period.**

A bankrupt is discharged from bankruptcy, in any case where he does not require an order of the court for his discharge<sup>1</sup>, by the expiration of the relevant period, that is to say:

- 797 (1) where a certificate for the summary administration of the bankrupt's estate has been issued and is not revoked before the bankrupt's discharge<sup>2</sup>, the period of two years beginning with the commencement of the bankruptcy<sup>3</sup>; and  
 798 (2) in any other case, the period of three years beginning with the commencement of the bankruptcy<sup>4</sup>.

1 le under the Insolvency Act 1986 s 280: see para 630 ante.

2 See para 206 et seq ante.

3 As to the commencement of bankruptcy see para 213 ante.

4 Insolvency Act 1986 s 279(1)(b), (2). Section 279 is without prejudice to any power of the court to annul a bankruptcy order: s 279(4). As to the power of court to suspend the discharge of a bankruptcy order see para 633 et seq post.

### **UPDATE**

#### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **631 Automatic discharge; the relevant period**

TEXT AND NOTES--Replaced. As to the period after which a bankrupt is automatically discharged from bankruptcy, see PARA 629.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(ii) Discharge of Bankruptcy Order/A. IN GENERAL/632. Certificate of discharge.

### **632. Certificate of discharge.**

Where it appears to the court that a bankrupt is discharged, whether by expiration of time or otherwise, the court must, on his application, issue to him a certificate of his discharge, and the date from which it is effective<sup>1</sup>.

The discharged bankrupt may require the Secretary of State to give notice of the discharge in the Gazette<sup>2</sup>, or in any newspaper in which the bankruptcy was advertised or in both<sup>3</sup>. Any such requirement by the former bankrupt must be addressed to the Secretary of State in writing; and the Secretary of State must notify him forthwith as to the cost of the advertisement<sup>4</sup>, and is under no obligation to advertise until that sum has been paid<sup>5</sup>.

1 Insolvent Rules 1986, SI 1986/1925, r 6.220(1). For the prescribed form of certificate of discharge see rr 6.220, 12.7(1), (2), Sch 4, Form 6.77 (amended by SI 1991/495). A court fee of £50 is payable on issue of a certificate of discharge: Supreme Court Fees Order 1999, SI 1999/687, art 3, Sch 1 para 6.4; County Court Fees Order 1999, SI 1999/689, art 3, Sch 1 para 8.4.

2 For the meaning of 'the Gazette' see para 171 note 5 ante.

3 Insolvent Rules 1986, SI 1986/1925, r 6.220(2). Where the former bankrupt has died, or is a person incapable of managing his affairs, within the meaning of Pt 7 Ch 7 (rr 7.43-7.46) (see para 815 post), the references to him in r 6.220(2) and r 6.220(3) (see infra) are to be read as referring to his personal representative or, as the case may be, a person appointed by the court to represent or act for him: r 6.220(4).

4 See para 622 note 8 ante.

5 Insolvent Rules 1986, SI 1986/1925, r 6.220(3). See also note 3 supra.

### **UPDATE**

#### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvent Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **632 Certificate of discharge**

NOTE 1--SI 1986/1925 Sch 4, Form 6.77 further amended: SI 2009/642. Fee now £60: Civil Proceedings Fees Order 2008, SI 2008/1053, art 2, Sch 1 Fee 3.4(a).

TEXT AND NOTES 2, 3--SI 1986/1925 r 6.220(2) substituted: SI 2009/642.

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### **B. SUSPENSION OF DISCHARGE**

### 633. Court's power to suspend discharge.

Where the court is satisfied on the application of the official receiver that an undischarged bankrupt who is entitled to an automatic discharge<sup>1</sup> has failed or is failing to comply with any of his obligations under Part IX of the Insolvency Act 1986<sup>2</sup>, the court may order that the relevant period<sup>3</sup> is to cease to run for such period, or until the fulfilment of such conditions, including a condition requiring the court to be satisfied as to any matter, as may be specified in the order<sup>4</sup>. Where the bankrupt's public examination is adjourned generally, the official receiver may there and then make application for the suspension of the bankrupt's automatic discharge<sup>5</sup>.

1    le under the Insolvency Act 1986 s 279(1)(b): see para 631 ante.

2    le *ibid* Pt IX (ss 264-371) (as amended).

3    For the meaning of 'the relevant period' see para 631 ante.

4    Insolvency Act 1986 s 279(3). See also para 631 ante. Section 279 is without prejudice to any power of the court to annul a bankruptcy order: s 279(4).

It is only the official receiver who is entitled to make an application under s 279 to suspend the automatic discharge and the court does not have jurisdiction to give directions to the official receiver as to the exercise of his function in deciding whether or not to make such an application: *Hardy v Focus Insurance Co Ltd* [1997] BPIR 77.

For an example of the exercise by the court of its discretion to suspend automatic discharge see *Re A Debtor (No 26 of 1991)* [1996] BCC 246, sub nom *Holmes v Official Receiver* [1996] BPIR 279 (bankrupt failing to comply with obligation to file with the trustee accounts of his post-bankruptcy business).

Where the return date for the official receiver's application is listed after the date on which the automatic discharge is due to take effect, the court may make an interim order extending the period of bankruptcy until the earliest date when the matter can be fully heard: *Jacobs v Official Receiver* [1998] 3 All ER 250, sub nom *Re Jacobs (a bankrupt)* [1999] 1 WLR 619.

5    Insolvency Rules 1986, SI 1986/1925, r 6.176(4). As to the adjournment of a bankrupt's public examination see para 300 et seq ante.

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 633 Court's power to suspend discharge

TEXT AND NOTES 1-4--Replaced. On the application of the official receiver or the trustee of a bankrupt's estate, the court may order that the bankruptcy period is cease to run until the end of a specified period, or the fulfilment of a specified condition: Insolvency Act 1986 s 279(3) (s 279 substituted by the Enterprise Act 2002 s 256). 'Condition' includes a condition requiring that the court be satisfied of something: 1986 Act s 279(5). The court may make an order under s 279(3) only if satisfied that the bankrupt has failed or is failing to comply with an obligation under Pt IX (ss 264-371): s 279(4).

NOTE 5--See *Shierson v Rastogi* [2007] EWHC 1266 (Ch), [2007] All ER (D) 446 (May).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(ii) Discharge of Bankruptcy Order/B. SUSPENSION OF DISCHARGE/634. Application for suspension of discharge.

### **634. Application for suspension of discharge.**

Where the official receiver applies to the court for an order<sup>1</sup> suspending the automatic discharge of the bankrupt, but not where he makes that application<sup>2</sup> on the adjournment of the bankrupt's public examination, the official receiver must with his application file a report setting out the reasons why it appears to him that such an order should be made<sup>3</sup>. The court must fix a venue<sup>4</sup> for the hearing of the application, and give notice of it to the official receiver, the trustee and the bankrupt<sup>5</sup>.

Copies of the official receiver's report must be sent by him to the trustee and the bankrupt, so as to reach them at least 21 days before the date fixed for the hearing<sup>6</sup>.

Not later than seven days before the date of the hearing, the bankrupt may file in court<sup>7</sup> a notice specifying any statements in the official receiver's report which he intends to deny or dispute; and, if he so gives notice, he must send copies of it, not less than four days before the date of the hearing, to the official receiver and the trustee<sup>8</sup>.

If on the hearing the court makes an order suspending the bankrupt's discharge, copies of the order must be sent by the court to the official receiver, the trustee and the bankrupt<sup>9</sup>. No costs or expenses in respect of the application fall on the official receiver personally<sup>10</sup>.

1    Ie under the Insolvency Act 1986 s 279(3): see para 631 ante.

2    Ie pursuant to the Insolvency Rules 1986, SI 1986/1925, r 6.176(4): see para 633 ante.

3    Ibid r 6.215(1), (2).

4    For the meaning of 'venue' see para 84 note 21 ante. As to the hearing of such applications see para 764 note 2 post.

5    Insolvency Rules 1986, SI 1986/1925, r 6.215(3).

6    Ibid r 6.215(4).

7    For the meaning of 'file in court' see para 95 note 10 ante.

8    Insolvency Rules 1986, SI 1986/1925, r 6.215(5).

9    Ibid r 6.215(6). For the prescribed form of order of suspension of discharge see rr 6.215, 12.7(1), (2), Sch 4, Form 6.72.

10   See ibid r 6.222; and para 641 post.

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **634 Application for suspension of discharge**

TEXT AND NOTES--SI 1986/1925 r 6.215 substituted: SI 2003/1730.

NOTE 9--SI 1986/1925 Form 6.72 substituted: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(ii) Discharge of Bankruptcy Order/B. SUSPENSION OF DISCHARGE/635. Lifting of suspension of discharge.

### **635. Lifting of suspension of discharge.**

Where the court makes an order<sup>1</sup> that the relevant period, that is to say, the period after which the bankrupt may have his discharge, is to cease to run, the bankrupt may apply to it for the order to be discharged<sup>2</sup>.

The court must fix a venue<sup>3</sup> for the hearing of the application; and the bankrupt must, not less than 28 days before the date fixed for the hearing, give notice of the venue to the official receiver and the trustee, accompanied in each case by a copy of the application<sup>4</sup>. The official receiver and the trustee may appear and be heard on the bankrupt's application; and, whether or not he appears, the official receiver may file in court<sup>5</sup> a report of any matters which he considers ought to be drawn to the court's attention<sup>6</sup>.

If the court's order<sup>7</sup> was for the relevant period to cease to run until the fulfilment of specified conditions, the court may request a report from the official receiver as to whether those conditions have or have not been fulfilled<sup>8</sup>.

If a report is so filed<sup>9</sup>, copies of it must be sent by the official receiver to the bankrupt and the trustee, not later than 14 days before the hearing<sup>10</sup>.

Not later than seven days before the date of the hearing, the bankrupt may file in court a notice specifying any statements in the official receiver's report which he intends to deny or dispute; and, if he so gives notice, he must send copies of it, not less than four days before the date of the hearing, to the official receiver and the trustee<sup>11</sup>.

If, on the bankrupt's application, the court, being satisfied that the relevant period should begin to run again, discharges the order, it must issue to the bankrupt a certificate that it has done so, with effect from a specified date and it must send copies of the certificate to the official receiver and the trustee<sup>12</sup>.

1    Ie under the Insolvency Act 1986 s 279(3): see para 631 ante.

2    Insolvency Rules 1986, SI 1986/1925, r 6.216(1).

3    For the meaning of 'venue' see para 84 note 21 ante. As to the hearing of such applications see para 764 note 2 post.

4    Insolvency Rules 1986, SI 1986/1925, r 6.216(2).

5    For the meaning of 'file in court' see para 95 note 10 ante.

6    Insolvency Rules 1986, SI 1986/1925, r 6.216(3).

7    See note 1 supra.

8    Insolvency Rules 1986, SI 1986/1925, r 6.216(4).

9    Ie under *ibid* r 6.216(3) or (4): see supra.



10 Ibid r 6.216(5).

11 Ibid r 6.216(6).

12 Ibid r 6.216(7) (amended by SI 1999/359). For the prescribed forms of order lifting suspension of discharge and certificate that order suspending discharge has been lifted see the Insolvency Rules 1986, SI 1986/1925, rr 6.216, 12.7(1), (2), Sch 4, Forms 6.73, 6.74 respectively.

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **635 Lifting of suspension of discharge**

TEXT AND NOTES--SI 1986/1925 r 6.216 substituted: SI 2003/1730.

NOTE 12--SI 1986/1925 Form 6.73 substituted: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(ii) Discharge of Bankruptcy Order/C. PROCEDURE ON APPLICATION FOR DISCHARGE/636. Application by bankrupt for discharge.

## ***C. PROCEDURE ON APPLICATION FOR DISCHARGE***

### **636. Application by bankrupt for discharge.**

If the bankrupt applies for an order discharging him from bankruptcy<sup>1</sup>, he must give to the official receiver notice of the application, and deposit with him such sum as the latter may require to cover his costs of the application<sup>2</sup>.

If satisfied that the above provisions have been complied with, the court must fix a venue<sup>3</sup> for the hearing of the application and give at least 42 days' notice of it to the official receiver and the bankrupt<sup>4</sup>. The official receiver must give notice accordingly to the trustee, and to every creditor who, to the official receiver's knowledge, has a claim outstanding against the estate which has not been satisfied<sup>5</sup>; and such notices must be given not later than 14 days before the date fixed for the hearing of the bankrupt's application<sup>6</sup>.

1 Ibid under the Insolvency Act 1986 s 280: see para 630 ante. Where an application is made by the bankrupt under s 280 for his discharge from bankruptcy, it is the duty of the official receiver to make a report to the court with respect to the prescribed matters; and the court must consider that report before determining what order, if any, to make under s 280: see s 289(2); and para 256 ante. As to the official receiver's report see para 637 post.

2 Insolvency Rules 1986, SI 1986/1925, r 6.217(1).

3 For the meaning of 'venue' see para 84 note 21 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.217(2).

5 Ibid r 6.217(3).

6 Ibid r 6.217(4).

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **636 Application by bankrupt for discharge**

NOTE 1--Provisions corresponding to those contained in the Insolvency Act 1986 s 289(2) are now in s 289(3) (s 289 substituted by the Enterprise Act 2002 s 258).

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### **637. Report of the official receiver.**

Where the bankrupt makes application for an order discharging him from bankruptcy<sup>1</sup>, the official receiver must, at least 21 days before the date fixed for the hearing of the application, file in court<sup>2</sup> a report containing the following information with respect to the bankrupt:

- 799 (1) any failure by him to comply with his obligations under the Insolvency Act 1986<sup>3</sup>;
- 800 (2) the circumstances surrounding the present bankruptcy, and those surrounding any previous bankruptcy of his;
- 801 (3) the extent to which, in the present and in any previous bankruptcy, his liabilities have exceeded his assets; and
- 802 (4) particulars of any distribution<sup>4</sup> which has been, or is expected to be, made to creditors in the present bankruptcy or, if such is the case, that there has been and is to be no distribution;

and the official receiver must include in his report any other matters which, in his opinion, ought to be brought to the court's attention<sup>5</sup>.

The official receiver must send a copy of his report to the bankrupt and the trustee, so as to reach them at least 14 days before the date of the hearing of the application<sup>6</sup>.

Not later than seven days before the date of the hearing, the bankrupt may file in court a notice specifying any statements in the official receiver's report which he intends to deny or dispute; and, if he so gives notice, he must send copies of it, not less than four days before the date of the hearing, to the official receiver and the trustee<sup>7</sup>.

The official receiver, the trustee and any creditor may appear on the hearing of the bankrupt's application, and may make representations and put to the bankrupt such questions as the court may allow<sup>8</sup>.

- 1 le under the Insolvency Act 1986 s 280: see para 630 ante.
- 2 For the meaning of 'file in court' see para 95 note 10 ante.
- 3 le under the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).
- 4 As to distributions see para 573 et seq ante.
- 5 Insolvency Rules 1986, SI 1986/1925, r 6.218(1). For the prescribed fee where the report is filed by the official receiver see the Insolvency Fees Order 1986, SI 1986/2030, art 4, Schedule Pt II, Fee 7 (amended by SI 1991/496).
- 6 Insolvency Rules 1986, SI 1986/1925, r 6.218(2).
- 7 Ibid r 6.218(3). For the prescribed form of notice see rr 6.218, 12.7(1), (2), Sch 4, Form 6.75.
- 8 Ibid r 6.218(4). As to the appearance of creditors see para 638 post; and for the prescribed fee where the official receiver attends the hearing see the Insolvency Fees Order 1986, SI 1986/2030, Schedule Pt II, Fee 7 (amended by SI 1991/496).

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 637 Report of the official receiver

NOTES 5, 8--SI 1986/2030 replaced: Insolvency Proceedings (Fees) Order 2004, SI 2004/593 (amended by SI 2005/544, SI 2006/561, SI 2007/521, SI 2008/714, SI 2009/645). A general administration fee, Fee B1, is now payable to an official receiver in relation to the performance of his duties on the making of a bankruptcy order: see SI 2004/593 Sch 2 para 2 (amended by SI 2007/521).

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### 638. Appearance and conduct of creditors.

Any creditor may appear on the hearing of the bankrupt's application for discharge and may make representations and put to the bankrupt such questions as the court may allow<sup>1</sup>.

Although creditors are under no obligation to appear on the hearing of an application for discharge, they must not contract themselves out of the opportunity of appearing<sup>2</sup>. Such contracts are illegal<sup>3</sup>; and an agreement by a trustee binding himself, at the instance of the bankrupt, to prevent any objection by the creditors to an order of discharge is most improper<sup>4</sup>. Suspicion of a fraudulent bargain to buy off opposition by creditors is insufficient ground for an application to rescind an order of discharge, but it may justify the court in allowing an application to stand over to allow investigation<sup>5</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 6.218(4).

2 *Kearley v Thomson* (1890) 24 QBD 742 at 745, CA.

3 *Hall v Dyson* (1852) 17 QB 785.

4 *Re Shaw* [1917] 2 KB 734, CA (where it was also held that the purchase of debts from individual creditors at different prices, without the fullest possible disclosure to them of every material fact, was a most dangerous proceeding, and was rightly taken into consideration by the registrar in making an order suspending the bankrupt's discharge).

5 The bribery of a creditor is contrary to the policy of bankruptcy law and is misconduct during the bankruptcy, which may amount to a bankruptcy offence contrary to the Insolvency Act 1986 s 356(2)(d) (see para 716 head (4) post) which the court would take into consideration in exercising its discretion under s 280(2) (see para 630 ante). Cf *Re Andrews, ex p Barrow* (1881) 18 ChD 464, CA (where it was held that a contract between a compounding debtor and a creditor, made after the composition by the debtor with his creditors had been entered into but before it had been completely carried out, to pay to the creditor his debt in full, was inconsistent with good faith to the creditors generally and was void).

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 639. Order of discharge on application.

An order of the court discharging the bankrupt from bankruptcy either absolutely<sup>1</sup> or subject to conditions with respect to income or property<sup>2</sup> must bear the date on which it is made, but does not take effect until such time as it is drawn up by the court<sup>3</sup>. The order then has effect retrospectively to the date on which it was made<sup>4</sup>.

Copies of any order made by the court on an application by the bankrupt for discharge<sup>5</sup> must be sent by the court to the bankrupt, the trustee and the official receiver<sup>6</sup>.

Where it appears to the court that a bankrupt is discharged, whether by expiration of time or otherwise, the court must, on his application, issue to him a certificate of his discharge, and the date from which it is effective<sup>7</sup>.

1 *Ie* under the Insolvency Act 1986 s 280(2)(b): see para 630 head (2) ante.

2 *Ie* under *ibid* s 280(2)(c): see para 630 head (3) ante.

3 Insolvency Rules 1986, SI 1986/1925, r 6.219(1). For the prescribed form of order see rr 6.219, 12.7(1), (2), Sch 4, Form 6.76 (amended by SI 1991/495).

4 Insolvency Rules 1986, SI 1986/1925, r 6.219(2).

5 *Ie* under the Insolvency Act 1986 s 280: see para 630 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 6.219(3).

7 See *ibid* r 6.220; and para 632 ante.

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **639 Order of discharge on application**

NOTE 3--SI 1986/1925 Sch 4, Form 6.76 further amended: SI 2009/642.

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### **640. Review or appeal of order.**

Every court having jurisdiction for the purposes of the Insolvency Act 1986<sup>1</sup> may review, rescind or vary any order made by it in the exercise of that jurisdiction<sup>2</sup>. The order may also be appealed<sup>3</sup>; and an order made by the court on an application by the bankrupt for discharge<sup>4</sup> may not be issued or gazetted<sup>5</sup> until the time allowed for appealing has expired or, if an appeal is entered, until the appeal has been determined<sup>6</sup>.

1 *Ie* under the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended). As to the courts having jurisdiction see paras 6, 7 ante.

2 See *ibid* s 375(1); and para 739 post. As to the application of s 375 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 452 note 4 ante.

3 See *ibid* s 375(2) (as amended); and para 739 post.

4 *Ie* under *ibid* s 280: see para 630 ante.

5 As to gazetting notices see para 787 post.

6 Insolvency Rules 1986, SI 1986/1925, r 6.221.

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **641. Official receiver's costs.**

In no case do any costs or expenses arising under the above provisions<sup>1</sup> fall on the official receiver personally<sup>2</sup>.

1    le the Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 22 (rr 6.215-6.222): see para 634 et seq ante.

2    Ibid r 6.222.

### **UPDATE**

#### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### ***D. EFFECT OF DISCHARGE***

#### **642. Effect of discharge.**

Where a bankrupt is discharged, the discharge releases him from all the bankruptcy debts<sup>1</sup>, but has no effect:

803 (1)    on the functions, so far as they remain to be carried out, of the trustee of his estate<sup>2</sup>; or

804 (2)    on the operation, for the purposes of the carrying out of those functions, of the provisions of Part IX of the Insolvency Act 1986<sup>3</sup>;

and, in particular, discharge does not affect the right of any creditor of the bankrupt to prove in the bankruptcy<sup>4</sup> for any debt from which the bankrupt is released<sup>5</sup>.

On obtaining his order of discharge, the bankrupt will cease to be subject to the various disqualifications which he is under as an undischarged bankrupt<sup>6</sup>.

1    For the meaning of 'bankruptcy debt' see para 491 ante.

2    As to the trustee's functions see para 456 et seq ante.

3    le the Insolvency Act 1986 Pt IX (ss 264-371) (as amended).

4 As to proofs of debt see para 490 et seq ante.

5 Insolvency Act 1986 s 281(1).

6 See para 697 et seq post.

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 642-646 Effect of Discharge

The Insolvency Act 1986 Sch 4A makes provision for bankruptcy restrictions orders and undertakings: see PARA 646A.

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### 643. Debts and liabilities from which discharge is no release.

With respect to the bankrupt, discharge does not:

- 805 (1) affect the right of any secured creditor<sup>1</sup> of the bankrupt to enforce his security for the payment of a debt from which the bankrupt is released<sup>2</sup>;
- 806 (2) release the bankrupt from any bankruptcy debt which he incurred in respect of, or forbearance in respect of which was secured by means of, any fraud<sup>3</sup> or fraudulent breach of trust to which he was a party<sup>4</sup>;
- 807 (3) release the bankrupt from any liability in respect of a fine<sup>5</sup> imposed for an offence or from any liability under a recognisance except, in the case of a penalty imposed for an offence under an enactment relating to the public revenue or of a recognisance, with the consent of the Treasury<sup>6</sup>;
- 808 (4) except to such extent and on such conditions as the court may direct, release the bankrupt from any bankruptcy debt which:

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- 6. (a) consists in a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty, or to pay damages by virtue of Part I of the Consumer Protection Act 1987<sup>7</sup>, being in either case damages in respect of personal injuries<sup>8</sup> to any person; or
- 7. (b) arises under any order made in family proceedings<sup>9</sup> or under a maintenance calculation<sup>10</sup> made under the Child Support Act 1991<sup>11</sup>;

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- 809 (5) release the bankrupt from such other bankruptcy debts, not being debts provable in his bankruptcy, as are prescribed<sup>12</sup>;
- 810 (6) release the bankrupt from any obligation arising under a confiscation order made under the Drug Trafficking Act 1994<sup>13</sup>, under the Proceeds of Crime (Scotland) Act 1995<sup>14</sup> or under<sup>15</sup> the Criminal Justice Act 1988<sup>16</sup>.

1 For the meaning of 'secured creditor' see para 560 ante.

2 Insolvency Act 1986 s 281(2).

3 For these purposes, 'fraud' means actual fraud and does not include constructive fraud, such as undue influence: *Mander v Evans* [2001] 3 All ER 811, [2001] 1 WLR 2378.

4 Insolvency Act 1986 s 281(3).

5 For these purposes, 'fine' means the same as in the Magistrates' Courts Act 1980 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139 note 6); Insolvency Act 1986 s 281(8). 'Fine' includes a confiscation order made under the Criminal Justice Act 1988 Pt VI (ss 71-102) (as amended); Criminal Justice Act 1988 s 170(1), Sch 15 para 110.

6 Insolvency Act 1986 s 281(4).

7 Ie the Consumer Protection Act 1987 Pt I (ss 1-9) (as amended); see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 518 et seq.

8 For these purposes, 'personal injuries' includes death and any disease or other impairment of a person's physical or mental condition: Insolvency Act 1986 s 281(8).

9 For these purposes, 'family proceedings' means: (1) family proceedings within the meaning of the Magistrates' Courts Act 1980 (see MAGISTRATES vol 29(2) (Reissue) para 739) and any proceedings which would be such proceedings but for s 65(1)(ii) (proceedings for the variation of an order for periodical payments: see MAGISTRATES vol 29(2) (Reissue) para 739)); and (2) family proceedings within the meaning of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-42) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 737); Insolvency Act 1986 s 281(8) (amended by the Children Act 1989 s 92(11), Sch 11 para 11(2)).

10 Ie a maintenance calculation under the Child Support Act 1991: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 553 et seq.

11 Insolvency Act 1986 s 281(5) (amended by the Consumer Protection Act 1987 s 48(1), Sch 4 para 12; the Children Act 1989 s 108(7), Sch 11 para 11(1), Sch 15; the Child Support Act 1991 s 58(13), Sch 5 para 7; the Child Support, Pensions and Social Security Act 2000 s 26, Sch 3 para 6).

12 Insolvency Act 1986 s 281(6).

13 Ie under the Drug Trafficking 1994 s 2.

14 Ie under the Proceeds of Crime (Scotland) Act 1995 ss 1, 8.

15 Ie under the Criminal Justice Act 1988 s 71 (as amended).

16 Insolvency Rules 1986, SI 1986/1925, r 6.223 (amended by SI 1987/1919; SI 1989/397); Interpretation Act 1978 s 17(2)(b).

## UPDATE

### 610-646 Annulment of bankruptcy order; discharge

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 642-646 Effect of Discharge

The Insolvency Act 1986 Sch 4A makes provision for bankruptcy restrictions orders and undertakings: see PARA 646A.

### 643 Debts and liabilities from which discharge is no release



NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 4--Dishonesty is an essential ingredient of a fraudulent breach of trust: *Woodland-Ferrari v UCL Group Retirement Benefits Scheme* [2002] EWHC 1354 (Ch), [2003] Ch 115, [2002] 3 All ER 670.

TEXT AND NOTES 13-16--Head (6). Confiscation orders are now made under the Proceeds of Crime Act 2002 s 6: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 390 et seq.

NOTE 16--SI 1986/1925 r 6.223 further amended: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(ii) Discharge of Bankruptcy Order/D. EFFECT OF DISCHARGE/644. Effect of discharge on third parties.

#### **644. Effect of discharge on third parties.**

Where a bankrupt is discharged, the discharge releases him from all the bankruptcy debts<sup>1</sup>, but does not affect the right of any creditor of the bankrupt to prove in the bankruptcy for a debt from which the bankrupt is released<sup>2</sup>; nor does discharge affect the right of any secured creditor<sup>3</sup> of the bankrupt to enforce his security for the payment of a debt from which the bankrupt is released<sup>4</sup>. Discharge does not release any person other than the bankrupt from any liability, whether as partner or co-trustee of the bankrupt or otherwise, from which the bankrupt is released by the discharge, or from any liability as surety for the bankrupt or as a person in the nature of such a surety<sup>5</sup>.

1 For the meaning of 'bankruptcy debt' see para 491 ante.

2 Insolvency Act 1986 s 281(1). As to the priority of creditors who prove their debts after payment of a dividend see para 598 ante.

3 For the meaning of 'secured creditor' see para 560 ante.

4 Insolvency Act 1986 s 281(2).

5 Ibid s 281(7).

### **UPDATE**

#### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **642-646 Effect of Discharge**

The Insolvency Act 1986 Sch 4A makes provision for bankruptcy restrictions orders and undertakings: see PARA 646A.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(ii) Discharge of Bankruptcy Order/D. EFFECT OF DISCHARGE/645. Effect of discharge on prosecutions.

#### **645. Effect of discharge on prosecutions.**

Without prejudice to his liability in respect of a subsequent bankruptcy, the bankrupt is not guilty of an offence<sup>1</sup> in respect of anything done after his discharge; but nothing<sup>2</sup> prevents the institution of proceedings against a discharged bankrupt for an offence committed before his discharge<sup>3</sup>.

1    Ie under the Insolvency Act 1986 Pt IX Ch VI (ss 350-362): see para 707 et seq post.

2    Ie in ibid Pt IX Ch VI (ss 350-362).

3    Ibid s 350(3); and see para 707 post.

#### **UPDATE**

#### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **642-646 Effect of Discharge**

The Insolvency Act 1986 Sch 4A makes provision for bankruptcy restrictions orders and undertakings: see PARA 646A.

#### **645 Effect of discharge on prosecutions**

TEXT AND NOTE 1--Now refers to the bankrupt or a person in respect of whom a bankruptcy restrictions order (see PARA 646A.1) is in force: Insolvency Act 1986 s 350(3A) (added by the Enterprise Act 2002 Sch 21 para 2).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(ii) Discharge of Bankruptcy Order/D. EFFECT OF DISCHARGE/646. Duties of discharged bankrupt.

#### **646. Duties of discharged bankrupt.**

After his discharge, the bankrupt must give to the trustee such information as to his affairs, attend on the trustee at such times, and do all such other things, as the trustee may<sup>1</sup> reasonably require<sup>2</sup>.

<sup>1</sup> le for the purposes of carrying out his functions under any of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

<sup>2</sup> Ibid s 333(1), (3). As to the application of s 333 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 345 note 1 ante.

## **UPDATE**

### **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **642-646 Effect of Discharge**

The Insolvency Act 1986 Sch 4A makes provision for bankruptcy restrictions orders and undertakings: see PARA 646A.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(14) ANNULMENT OF BANKRUPTCY ORDER; DISCHARGE/(ii) Discharge of Bankruptcy Order/D. EFFECT OF DISCHARGE/646A. Post-discharge restrictions.

### **646A. Post-discharge restrictions.**

#### **1. Bankruptcy restrictions orders**

A bankruptcy restrictions order may be made by the court<sup>1</sup>. The court must grant an application for a bankruptcy restrictions order if it thinks it appropriate having regard to the conduct of the bankrupt, whether before or after the making of the bankruptcy order<sup>2</sup>. The court must, in particular, take into account any of the following kinds of behaviour on the part of the bankrupt: (1) failing to keep records which account for a loss of property by the bankrupt, or by a business carried on by him, where the loss occurred in the period beginning two years before petition<sup>3</sup> and ending with the date of the application<sup>4</sup>; (2) failing to produce records of that kind on demand by the official receiver or the trustee<sup>5</sup>; (3) entering into a transaction at an undervalue<sup>6</sup>; (4) giving a preference<sup>7</sup>; (5) making an excessive pension contribution<sup>8</sup>; (6) a failure to supply goods or services which were wholly or partly paid for which gave rise to a claim provable in the bankruptcy<sup>9</sup>; (7) trading at a time before commencement of the bankruptcy when the bankrupt knew or ought to have known that he was himself to be unable to pay his debts<sup>10</sup>; (8) incurring, before commencement of the bankruptcy, a debt which the bankrupt had no reasonable expectation of being able to pay<sup>11</sup>; (9) failing to account satisfactorily to the court, the official receiver or the trustee for a loss of property or for an insufficiency of property to meet bankruptcy debts<sup>12</sup>; (10) carrying on any gambling, rash and hazardous speculation or unreasonable extravagance which may have materially contributed to or increased the extent of the bankruptcy or which took place between presentation of the petition and commencement of the bankruptcy<sup>13</sup>; (11) neglect of business affairs of a kind

which may have materially contributed to or increased the extent of the bankruptcy<sup>14</sup>; (12) fraud or fraudulent breach of trust<sup>15</sup>; (13) failing to cooperate with the official receiver or the trustee<sup>16</sup>. The court must also, in particular, consider whether the bankrupt was an undischarged bankrupt at some time during the period of six years ending with the date of the bankruptcy to which the application relates<sup>17</sup>.

An application for a bankruptcy restrictions order in respect of a bankrupt must be made before the end of the period of one year beginning with the date on which the bankruptcy commences<sup>18</sup>, or with the permission of the court<sup>19</sup>. A bankruptcy restrictions order comes into force when it is made<sup>20</sup>, and ceases to have effect at the end of a date specified in the order<sup>21</sup>.

The Secretary of State must maintain a register of bankruptcy restrictions orders<sup>22</sup>, interim bankruptcy restrictions orders<sup>23</sup>, and bankruptcy restrictions undertakings<sup>24</sup> ('the bankruptcy restrictions register'), which must be open to public inspection<sup>25</sup>.

1     Insolvency Act 1986 Sch 4A para 1(1) (Sch 4A added by Enterprise Act 2002 Sch 20). An order may be made only on the application of (1) the Secretary of State, or (2) the official receiver acting on a direction of the Secretary of State: 1986 Act Sch 4A para 1(2). For procedural provisions relating to bankruptcy restrictions orders, see the Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 28 (rr 6.240-6.244) (added by SI 2003/1730).

2     1986 Act Sch 4A para 2(1). The court is required to examine and evaluate the bankrupt's conduct and to form a view whether a bankruptcy restrictions order should be made and if so impose at least the minimum period: *Randhawa v Official Receiver* [2006] EWHC 2946 (Ch), [2007] 1 All ER 755; applied in *Official Receiver v Pyman* [2007] EWHC 2002 (Ch), [2007] BPIR 1150. The fact that a charge is void as opposed to voidable is immaterial when the bankrupt knows of his insolvency and intended to make an asset unavailable to his creditors: *Official Receiver v Bathurst* [2008] EWHC 1724 (Ch), [2008] BPIR 1548, [2008] All ER (D) 18 (Jun).

3     'Before petition' is to be construed in accordance with the 1986 Act s 351(c) (see PARA 709): Sch 4A para 2(4).

4     Ibid Sch 4A para 2(2)(a).

5     Ibid Sch 4A para 2(2)(b).

6     Ibid Sch 4A para 2(2)(c). 'Undervalue' is to be construed in accordance with s 339 (see PARA 653 et seq): Sch 4A para 2(4).

7     Ibid Sch 4A para 2(2)(d). 'Preference' is to be construed in accordance with s 340 (see PARA 356 et seq): Sch 4A para 2(4).

8     Ibid Sch 4A para 2(2)(e). 'Excessive pension contribution' is to be construed in accordance with s 342A (see PARA 668): Sch 4A para 2(4).

9     Ibid Sch 4A para 2(2)(f).

10    Ibid Sch 4A para 2(2)(g).

11    Ibid Sch 4A para 2(2)(h).

12    Ibid Sch 4A para 2(2)(i).

13    Ibid Sch 4A para 2(2)(j).

14    Ibid Sch 4A para 2(2)(k).

15    Ibid Sch 4A para 2(2)(l).

16    Ibid Sch 4A para 2(2)(m).

17    Ibid Sch 4A para 2(3).

18    Ibid Sch 4A para 3(1)(a). This period ceases to run in respect of a bankrupt while the period set for his discharge is suspended under s 279(3) (see PARA 633): Sch 4A para 3(2).

19    Ibid Sch 4A para 3(1)(b).

20 Ibid Sch 4A para 4(1)(a).

21 Ibid Sch 4A para 4(1)(b). The date so specified must not be before the end of the period of two years beginning with the date on which the order is made, or after the end of the period of 15 years beginning with that date: Sch 4A para 4(2).

22 Ibid Sch 4A para 12(a).

23 Ibid Sch 4A para 12(b). As to interim bankruptcy restrictions orders, see PARA 646A.2.

24 Ibid Sch 4A para 12(c). As to bankruptcy restrictions undertakings see PARA 646A.3.

25 Insolvency Rules 1986, SI 1986/1925, Pt 6A Ch 1 (r 6A.1) (Pt 6A added by SI 2003/1730; and amended by SI 2004/584, SI 2009/642). As to the information to be entered onto and deleted from the bankruptcy restrictions register, see SI 1986/1925 Pt 6A Ch 3 (rr 6A.6, 6A.7). The Secretary of State must rectify any inaccuracies in the register: Pt 6A Ch 4 (r 6A.8) (added by SI 2003/1730; and amended by SI 2009/642).

## 2. Interim bankruptcy restrictions orders

At any time between the institution of an application for a bankruptcy restrictions order<sup>1</sup>, and the determination of the application<sup>2</sup>, the court may make an interim bankruptcy restrictions order if it thinks that there are prima facie grounds to suggest that the application for the bankruptcy restrictions order will be successful<sup>3</sup>, and it is in the public interest to make an interim order<sup>4</sup>.

An interim order ceases to have effect on the determination of the application for the bankruptcy restrictions order<sup>5</sup>, on the acceptance of a bankruptcy restrictions undertaking made by the bankrupt<sup>6</sup>, or if the court discharges the interim order on the application of the person who applied for it or of the bankrupt<sup>7</sup>.

1 Insolvency Act 1986 Sch 4A para 5(1)(a) (Sch 4A added by Enterprise Act 2002 Sch 20).

2 1986 Act Sch 4A para 5(1)(b).

3 Ibid Sch 4A para 5(2)(a).

4 Ibid Sch 4A para 5(2)(b). An interim order may be made only on the application of (1) the Secretary of State, or (2) the official receiver acting on a direction of the Secretary of State: Sch 4A para 5(3). An interim order has the same effect as a bankruptcy restrictions order (see PARA 646A.1), and comes into force when it is made: Sch 4A para 5(4). In a case in which both an interim bankruptcy restrictions order and a bankruptcy restrictions order are made, Sch 4A para 4(2) (see PARA 646A.1 NOTE 21) has effect in relation to the bankruptcy restrictions order as if a reference to the date of that order were a reference to the date of the interim order: Sch 4A para 6. For procedural provisions relating to interim bankruptcy restrictions orders, see the Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 29 (rr 6.245-6.248) (added by SI 2003/1730).

5 1986 Act Sch 4A para 5(5)(a).

6 Ibid Sch 4A para 5(5)(b).

7 Ibid Sch 4A para 5(5)(c).

## 3. Bankruptcy restrictions undertakings

A bankrupt may offer a bankruptcy restrictions undertaking to the Secretary of State<sup>1</sup>. In determining whether to accept a bankruptcy restrictions undertaking the Secretary of State must have regard to the same matters which it must take into account in deciding whether to make a bankruptcy restrictions order<sup>2</sup>. A bankruptcy restrictions undertaking comes into force on being accepted by the Secretary of State<sup>3</sup>, and ceases to have effect at the end of a date specified in the undertaking<sup>4</sup>.

On an application by the bankrupt the court may (1) annul a bankruptcy restrictions undertaking<sup>5</sup>; (2) provide for a bankruptcy restrictions undertaking to cease to have effect before the date specified in the undertaking<sup>6</sup>.

1 Insolventy Act 1986 Sch 4A para 7(1) (Sch 4A added by Enterprise Act 2002 Sch 20).

2 1986 Act Sch 4A para 7(2). As to those matters see PARA 646A.1 TEXT AND NOTES 3-17). A reference in an enactment to a person in respect of whom a bankruptcy restrictions order has effect, or who is 'the subject of' a bankruptcy restrictions order, includes a reference to a person in respect of whom a bankruptcy restrictions undertaking has effect: Sch 4A para 8. For procedural provisions relating to bankruptcy restriction undertakings, see the Insolventy Rules 1986, SI 1986/1925, Pt 6 Ch 30 (rr 6.249-6.251) (added by SI 2003/1730).

3 1986 Act Sch 4A para 9(1)(a).

4 Ibid Sch 4A para 9(1)(b). The date so specified must not be before the end of the period of two years beginning with the date on which the undertaking is accepted, or after the end of the period of 15 years beginning with that date: Sch 4A para 9(2).

5 Ibid Sch 4A para 9(3)(a).

6 Ibid Sch 4A para 9(3)(b).

#### **4. Effect of annulment of bankruptcy order**

Where a bankruptcy order is annulled<sup>1</sup> any bankruptcy restrictions order<sup>2</sup>, interim order<sup>3</sup> or undertaking<sup>4</sup> which is in force in respect of the bankrupt is annulled<sup>5</sup>, no new bankruptcy restrictions order or interim order may be made in respect of the bankrupt<sup>6</sup>, and no new bankruptcy restrictions undertaking by the bankrupt may be accepted<sup>7</sup>.

Where a bankruptcy order is annulled<sup>8</sup> (1) the annulment does not affect any bankruptcy restrictions order, interim order or undertaking in respect of the bankrupt<sup>9</sup>; (2) the court may make a bankruptcy restrictions order in relation to the bankrupt on an application instituted before the annulment<sup>10</sup>; (3) the Secretary of State may accept a bankruptcy restrictions undertaking offered before the annulment<sup>11</sup>; and (4) an application for a bankruptcy restrictions order or interim order in respect of the bankrupt may not be instituted after the annulment<sup>12</sup>.

1 Ie under the Insolventy Act 1986 s 282(1)(a) (see PARA 610) or (2) (see PARA 852)3.

2 Ibid Sch 4A para 10(a) (Sch 4A added by Enterprise Act 2002 Sch 20).

3 As to bankruptcy restrictions orders see PARA 646A.1.

4 As to interim bankruptcy restrictions orders see PARA 646A.2.

5 As to bankruptcy restrictions undertakings see PARA 646A.3.

6 1986 Act Sch 4A para 10(b).

7 Ibid Sch 4A para 10(c).

8 Ie under ibid s 261 (see PARA 107), 263D (see PARA 123A) or 282(1)(b) (see PARA 610).

9 Ibid Sch 4A para 11(a).

10 Ibid Sch 4A para 11(b).

11 Ibid Sch 4A para 11(c).

12 Ibid Sch 4A para 11(d).

#### **UPDATE**

## **610-646 Annulment of bankruptcy order; discharge**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **642-646 Effect of Discharge**

The Insolvency Act 1986 Sch 4A makes provision for bankruptcy restrictions orders and undertakings: see PARA 646A.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(i) Rights of Occupation/647. Rights under trusts of land.

## **(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC**

### **(i) Rights of Occupation**

#### **647. Rights under trusts of land.**

Where a person who is subsequently adjudged bankrupt and another person holds a beneficial interest in land, and are together trustees of land or have an interest in a property which is subject to a trust of land, then, on the vesting of the bankrupt's estate in his trustee in bankruptcy<sup>1</sup>, the trustee will acquire all the rights previously vested in the bankrupt as a trustee of land, including, as the holder of a beneficial interest in the land or property, the right to apply to the court for an order in the event that the trustees of land refuse to sell or to exercise any of their other powers<sup>2</sup>.

Any application by the trustee of the bankrupt's estate for an order under the Trusts of Land and Appointment of Trustees Act 1996<sup>3</sup> for an order for the sale of land must be made to the court having jurisdiction in relation to the bankruptcy<sup>4</sup>.

On such an application the court must make such order as it thinks just and reasonable having regard to:

- 811 (1) the interests of the bankrupt's creditors;
- 812 (2) where the application is made in respect of land which includes a dwelling house<sup>5</sup> which is or has been the home of the bankrupt or the bankrupt's spouse or former spouse:
- .8
- 8. (a) the conduct of the spouse or former spouse, so far as contributing to the bankruptcy;
- 9. (b) the needs and financial resources of the spouse or former spouse; and
- 10. (c) the needs of any children; and
- .9
- 813 (3) all the circumstances of the case other than the needs of the bankrupt<sup>6</sup>.

Where such an application is made after the end of the period of one year beginning with the first vesting<sup>7</sup> of the bankrupt's estate in the trustee in bankruptcy, the court must assume, unless the circumstances of the case are exceptional, that the interest of the bankrupt's creditors outweigh all other considerations<sup>8</sup>.

1 As to the vesting of the bankrupt's estate in the trustee see para 390 et seq ante.

2 As to the powers of the court in relation to trusts of land see the Trusts of Land and Appointment of Trustees Act 1996 s 14; REAL PROPERTY vol 39(2) (Reissue) para 67; and TRUSTS vol 48 (2007 Reissue) para 1038.

3 le under ibid s 14.

4 Insolvency Act 1986 s 335A(1) (added by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 23). The jurisdiction conferred by the Insolvency Act 1986 s 335A (as added) is exclusive to the bankruptcy. As to the courts having jurisdiction in bankruptcy see paras 6, 7 ante; as to the allocation of bankruptcy proceedings see para 764 post; and as to the transfer of proceedings between bankruptcy courts see para 734 post.

Section 335A (as added) came into force on 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974, art 2. However, the powers conferred on the court by the Insolvency Act 1986 s 335A (as added) are exercisable on an application whether it is made before or after the commencement of s 335A (as so added): s 335A(4) (added by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 23).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 335A (as added) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 26. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 For the meaning of 'dwelling house' see para 401 note 1 ante.

6 Insolvency Act 1986 s 335A(2) (added by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 23). It is an abuse of process for a trustee in bankruptcy to make an application for possession and sale of a bankrupt's former matrimonial home on behalf of a secured creditor: *Re Ng (a bankrupt)* [1997] BCC 507, sub nom *Re Ng (a bankrupt), Trustee of the Estate of Ng v Ng* [1997] BPIR 267.

7 le under the Insolvency Act 1986 Pt IX Ch IV (ss 305-335) (as amended): see para 390 et seq ante. Section 335A(2) (as added: see note 6 supra) effectively re-enacts the law in force prior to 29 December 1986 (see para 2 ante) in respect of an application by a trustee for possession of the matrimonial home under the Law of Property Act 1925 s 30 (repealed: see now the Trusts of Land and Appointment of Trustees Act 1996 s 14). In *Re Turner (a bankrupt), ex p Trustee of Property of Bankrupt v Turner (a bankrupt)* [1975] 1 All ER 5, [1974] 1 WLR 1556 it was held that, in exercising its discretion as to whether or not to order a sale, the question for the court was whose voice in equity ought to prevail and that, in the absence of special considerations, the trustee's statutory duty to realise the husband's interest in the property gave him the stronger claim. See also *Re Solomon (a bankrupt), ex p Trustee of Property of Bankrupt v Solomon* [1967] Ch 573, [1966] 3 All ER 255; *Re Densham (a bankrupt), ex p Trustee of Property of Bankrupt v Bankrupt* [1975] 3 All ER 726, [1975] 1 WLR 1519; *Re Bailey (a bankrupt) (No 25 of 1975)* [1977] 2 All ER 26, [1977] 1 WLR 278, DC; *Re Lowrie (a bankrupt), ex p Trustee of Bankrupt v Bankrupt* [1981] 3 All ER 353, DC; *Re Citro (a bankrupt)* [1991] Ch 142, [1990] 3 All ER 952, CA; *Lloyds Bank plc v Byrne* [1993] 2 FCR 41, [1993] 1 FLR 369, CA; *Abbey National plc v Moss* [1994] 2 FCR 587, [1994] 1 FLR 307, CA (mother and daughter were joint owners); *Zandfarid v Bank of Credit and Commerce International SA (in liquidation)* [1996] 1 WLR 1420, [1997] 1 FCR 78; *Trustee of the Estate of Eric Bowe (a bankrupt) v Bowe* [1998] 2 FLR 439, [1997] BPIR 747 (probability that the whole of the net proceeds of sale of the home will be absorbed in defraying the expenses of the bankruptcy not exceptional); *Harrington v Bennett* [2000] BPIR 630 (a case decided under the new, amended provisions; 'exceptional' means outside the usual melancholy consequences of debt or improvidence). For cases where exceptional circumstances were found see *Re Holliday (a bankrupt), ex p Trustee of Property of Bankrupt v Holliday* [1981] Ch 405, [1980] 3 All ER 385, CA (where a divorced husband filed his own bankruptcy petition motivated by a desire to defeat his former wife's application for a property adjustment order; sale postponed five years primarily for the benefit of the children); *Re Mott, ex p Trustee of Property of Bankrupt v Mott and McQuitty* [1987] CLY 212 (where sale was postponed until after the death of a 70-year old widow in poor health likely to deteriorate if she had to move, the co-owner being her son, and the creditors in the main being the Commissioners of Inland Revenue and the Department of Health and Social Security); *Re Gorman (a bankrupt), ex p Trustee of Bankrupt v Bankrupt* [1990] 1 All ER 717, [1990] 1 WLR 616 (spouse had actionable claim for negligence against her solicitors which was strong and nearly ready for trial; the court gave her time to raise the funds to purchase the interest of the trustee); *Re Raval (a bankrupt)* [1998] 2 FLR 718, [1998] BPIR 389 (a case decided under the new, amended provisions; wife was a paranoid schizophrenic); *Claughton v Charalamabous* [1998] BPIR 558 (a case decided under the new, amended provisions; seriously ill spouse with special housing needs and reduced



life expectancy); *Re Bremner (a bankrupt)* [1999] 1 FLR 912, [1999] BPIR 185 (a case decided under the new, amended provisions; bankrupt terminally ill). In the normal event, the Insolvency Act 1986 s 336(5) (see para 648 post) gives the spouse one year's grace before the trustee may bring an application which will result in a sale postponed for no more than a short time to enable the spouse to make arrangements for any family and, perhaps, to raise sufficient capital to purchase the bankrupt's share of the property. Section 313 (see para 401 ante), however, provides a power in the court to impose a charge on the bankrupt's house for the benefit of the estate where the trustee is unable for the time being to realise that property. The bankrupt's house, which will then revert to the bankrupt (see s 313(3); and para 401 ante), will remain subject to this charge after the bankrupt obtains his discharge from bankruptcy. Such a charge provides the means whereby the creditors' interests receive some measure of protection without the need to enforce a sale of the house of the bankrupt, his spouse and any children of the family.

8 Ibid s 335A(3) (added by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 23). The term 'creditors' in the Insolvency Act 1986 s 335A(3) (as so added) refers to both secured and unsecured creditors: *Re Bankrupts (Nos 9587 and 9588 of 1994)*, *Judd v Brown* [1998] 2 FLR 360, [1997] BPIR 470.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### 647 Rights under trusts of land

NOTE 2--See *Turner v Avis* [2007] EWCA Civ 748, [2007] 4 All ER 1103. Where the bankrupt's co-owner is in occupation, a trustee may be entitled to occupation rent or equitable compensation: see *Re Barcham* [2008] EWHC 1505 (Ch), [2009] 1 All ER 145.

TEXT AND NOTE 6--1986 Act s 335A(2) amended: Civil Partnership Act 2004 Sch 27 para 118.

NOTE 6--See *Re Byford* [2003] EWHC 1267 (Ch), [2004] 1 P & CR 159 (co-owner remained in sole occupation of matrimonial home; as co-owner's occupation prevented trustee in bankruptcy from obtaining any benefit from property, payment of occupation rent was reasonable). It is axiomatic that what creditors want is to be paid their money as soon as possible and, therefore, it is not necessary for the trustee in bankruptcy to do very much by way of positive evidence to ascertain their identity or their concerns: *Nicholls v Lan* [2006] EWHC 1255 (Ch), [2007] 1 FLR 744.

NOTE 8--As to the compatibility of the 1986 Act s 335A(3) with the European Convention on Human Rights, particularly in relation to the courts' interpretation of exceptional circumstances for those purposes, see *Barca v Mears* [2004] EWHC 2170 (Ch), [2005] 2 FLR 1; *Donohoe v Ingram (Trustee in Bankruptcy of Kirkup)* [2006] 2 FLR 1084.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(i) Rights of Occupation/648. Rights of occupation of bankrupt's spouse.

#### 648. Rights of occupation of bankrupt's spouse.

Where a spouse's matrimonial home rights<sup>1</sup> are a charge on the estate or interest of the other spouse, or of trustees for the other spouse, and the other spouse is adjudged bankrupt:

- 814 (1) the charge continues to subsist notwithstanding the bankruptcy and, subject to the provisions of the Family Law Act 1996, binds the trustee of the bankrupt's estate and persons deriving title under that trustee; and
- 815 (2) any application for an occupation order where the applicant has an estate or interest or has a matrimonial home right<sup>2</sup> must be made to the court having jurisdiction in relation to the bankruptcy<sup>3</sup>.

However, nothing occurring in the initial period of the bankruptcy, that is to say, the period beginning with the day of the presentation of the petition for the bankruptcy order<sup>4</sup> and ending with the vesting of the bankrupt's estate in a trustee<sup>5</sup>, is to be taken as having given rise to matrimonial home rights<sup>6</sup> in relation to a dwelling house comprised in the bankrupt's estate<sup>7</sup>.

On an application for an order for possession under the above provisions<sup>8</sup>, the court may make such an order<sup>9</sup> as it thinks just and reasonable having regard to:

- 816 (a) the interests of the bankrupt's creditors;
- 817 (b) the conduct of the spouse or former spouse, so far as contributing to the bankruptcy;
- 818 (c) the needs and financial resources of the spouse or former spouse;
- 819 (d) the needs of any children; and
- 820 (e) all the circumstances of the case other than the needs of the bankrupt<sup>10</sup>.

Where such an application is made after the end of the period of one year beginning with the first vesting of the bankrupt's estate in a trustee<sup>11</sup>, the court must assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations<sup>12</sup>.

1 le under the Family Law Act 1996: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

2 le under ibid s 33: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 292.

3 Insolvency Act 1986 s 336(2) (amended by the Family Law Act 1996 s 66(1), Sch 8 para 57). As to the courts having jurisdiction in bankruptcy see paras 6, 7 ante.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 336 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 26. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 See para 124 et seq ante.

5 See para 390 et seq ante. For the meaning of 'the bankrupt's estate' see para 216 ante.

6 le under the Family Law Act 1996 Pt IV (ss 30-63) (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

7 Insolvency Act 1986 s 336(1) (amended by the Family Law Act 1996 Sch 8 para 57).

8 le under the Insolvency Act 1986 s 336(2) (as amended): see supra.

9 See note 2 supra.

10 Insolvency Act 1986 s 336(4) (amended by the Family Law Act 1996 Sch 8 para 57; and the Trusts of Land and Appointment of Trustees Act 1996 ss 25(2), (4), (5), Sch 4).

11 le under the Insolvency Act 1986 Pt IX Ch IV (ss 305-335) (as amended): see para 390 et seq ante.

12 Ibid s 336(5). See also para 647 note 7 ante.

## UPDATE

## **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **648 Rights of occupation of bankrupt's spouse [or civil partner]**

TEXT AND NOTES--Insolvency Act 1986 s 336 further amended so as to apply provisions to civil partners: Civil Partnership Act 2004 Sch 9 para 21.

NOTE 10--See *Re Haghghat (a bankrupt)* [2009] EWHC 649 (Ch), [2009] BPIR 268, [2009] All ER (D) 31 (Jan) (possession order deferred in consideration of needs of disabled child).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(i) Rights of Occupation/649. Spouse's equity of exoneration; equitable accounting.

## **649. Spouse's equity of exoneration; equitable accounting.**

If the property of a married woman is mortgaged or charged in order to raise money for the payment of her husband's debts, or otherwise for his benefit, it is presumed, in the absence of evidence showing an intention to the contrary, that she meant to charge her property merely by way of security, and in such case she is in the position of surety, and is entitled to be indemnified by the husband, and to throw the debt primarily on his estate to the exoneration of her own<sup>1</sup>. Where the husband becomes bankrupt, the wife will be able, if the equity is applied, to throw the burden of any such charge on to the bankrupt's beneficial interest in any jointly held property<sup>2</sup>. The equity of exoneration is, however, a presumptive right only; it depends on the intention of the parties, which need not be expressed, that the wife should be in the position of surety for her husband<sup>3</sup>.

The presumption in favour of the wife has been displaced in circumstances where the evidence showed that the wife intended to make a gift to the husband<sup>4</sup>, the money raised on the charge was to pay debts of her husband incurred to maintain an extravagant life style on the part of both the husband and the wife<sup>5</sup>, the money raised on the charge was used in part to discharge the wife's debts<sup>6</sup>, or the money was borrowed for the wife's benefit either wholly or jointly with her husband<sup>7</sup>.

The equity of exoneration applies equally in the case of a husband who has charged his property as surety for the benefit of his wife<sup>8</sup>.

When ordering the sale of the property, the court will direct equitable accounting between the trustee of the co-owner in respect of contributions which have enhanced the value of the property<sup>9</sup>.

<sup>1</sup> *Earl of Huntingdon v Countess Dowager Huntingdon* (1702) 2 Bro Parl Cas 1, HL; *Pocock v Lee* (1707) 2 Vern 604; *Parteriche v Powlet* (1742) 2 Atk 383; *Aguilar v Aguilar Lousada* (1820) 5 Madd 414; *Re Pittortou (a bankrupt)*, *ex p Trustee of Property of Bankrupt*, *v Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58. As to a spouse's equity of exoneration generally see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 239 et seq.

2 *Re Pittortou (a bankrupt), ex p Trustee of Property of Bankrupt, v Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58; and see *Re A Debtor (No 24 of 1971), ex p Marley v Trustee of Property of Debtor* [1976] 2 All ER 1010, [1976] 1 WLR 952, DC.

3 *Paget v Paget* [1898] 1 Ch 470, CA; *Pocock v Lee* (1707) 2 Vern 604; *Aguilar v Aguilar Lousada* (1820) 5 Madd 414; *Gee v Smart* (1857) 8 E & B 313.

4 *Clinton v Hooper* (1791) 3 Bro CC 201.

5 *Paget v Paget* [1898] 1 Ch 470, CA.

6 *Lewis v Nangle* (1752) 1 Cox Eq Cas 240.

7 *Hudson v Carmichael* (1854) Kay 613; *Gray v Dowman* (1858) 27 LJ Ch 702; *Re Pittortou (a bankrupt), ex p Trustee of Property of Bankrupt, v Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58 (money used for general household and family living expenses will be treated as used for the joint benefit of the wife and the husband). The court may order an inquiry as to which sums forming part of the money raised under the charge went solely to the benefit of the husband, whether in his business or on his personal account, and which went for the benefit of the wife, either solely or jointly with her husband or children. In respect of the latter sums, the wife has no right of exoneration: see *Re Pittortou (a bankrupt), ex p Trustee of Property of Bankrupt, v Bankrupt* supra (where such an inquiry was directed).

8 *Bagot v Oughton* (1717) 1 P Wms 347; *Gray v Dowman* (1858) 27 LJ Ch 702.

9 *Re Pittortou (a bankrupt), ex p Trustee of Property of Bankrupt, v Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58; *Re Gorman (a bankrupt), ex p Trustee of Bankrupt v Bankrupt* [1990] 1 All ER 717, [1990] 1 WLR 616 (mortgage payments and improvements); *Re Pavlou (a bankrupt)* [1993] 3 All ER 955, [1993] 1 WLR 1046 (mortgage payments and improvements). For the purposes of an equitable accounting between the bankrupt and spouse, it makes no difference whether they hold the beneficial interest as joint tenants or tenants in common: *Re Pavlou (a bankrupt)* supra.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(i) Rights of Occupation/650. Rights of occupation of bankrupt.

### 650. Rights of occupation of bankrupt.

Where a person who is entitled to occupy a dwelling house<sup>1</sup> by virtue of a beneficial estate or interest is adjudged bankrupt, and any persons under the age of 18 with whom that person had at some time occupied that dwelling house had their home with that person at the time when the bankruptcy petition was presented<sup>2</sup> and at the commencement of the bankruptcy<sup>3</sup>, the following provisions apply<sup>4</sup>.

Whether or not the bankrupt's spouse, if any, has matrimonial home rights<sup>5</sup>:

821 (1) the bankrupt has the following rights as against the trustee of his estate:

.10

11. (a) if in occupation, a right not to be evicted or excluded from the dwelling house or any part of it, except with the permission of the court;

12. (b) if not in occupation, a right with the permission of the court to enter into and occupy the dwelling house; and

.11

- 822 (2) the bankrupt's rights are a charge, having the like priority as an equitable interest created immediately before the commencement of the bankruptcy, on so much of his estate or interest in the dwelling house as vests in his trustee<sup>6</sup>.

1 For the meaning of 'dwelling house' see para 401 note 1 ante.

2 See para 124 et seq ante.

3 As to the commencement of bankruptcy see para 213 ante.

4 Insolvency Act 1986 s 337(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 337 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 26. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 le under the Family Law Act 1996: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

6 Insolvency Act 1986 s 337(2) (amended by the Family Law Act 1996 s 66(1), Sch 8 para 58). The Family Law Act 1996 has effect, with the necessary modifications, as if: (1) the rights conferred by the Insolvency Act 1986 s 337(2)(a) (see text head (1) supra) were matrimonial home rights under the Family Law Act 1996; (2) any application for permission there mentioned were an application for an order under s 33 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 292); and (3) any charge under the Insolvency Act 1986 s 337(2)(b) (see text head (2) supra) on the estate or interest of the trustee were a charge under the Family Law Act 1996 on the estate or interest of a spouse: Insolvency Act 1986 s 337(3) (substituted by the Family Law Act 1996 Sch 8 para 58).

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 650 Rights of occupation of bankrupt

TEXT AND NOTE 6--Insolvency Act 1986 s 337(2), (3) further amended so as to apply provisions to civil partners: Civil Partnership Act 2004 Sch 9 para 22.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(i) Rights of Occupation/651. Application for possession against bankrupt.

### 651. Application for possession against bankrupt.

The rights of the bankrupt, if in occupation, not to be evicted or excluded from the dwelling house<sup>1</sup> or any part of it, except with the permission of the court and, if not in occupation, with the permission of the court to enter into and occupy the dwelling house<sup>2</sup> take effect as if they were matrimonial home rights under Part IV of the Family Law Act 1996<sup>3</sup>; and any application for permission<sup>4</sup> takes effect as if it were an application for an order<sup>4</sup> under that Act<sup>5</sup>.

Any such application for permission or for an order under the Family Law Act 1996 must be made to the court having jurisdiction in relation to the bankruptcy<sup>6</sup>. On such an application the court must make such order as it thinks just and reasonable having regard to the interests of the creditors, to the bankrupt's financial resources, to the needs of the children and to all the circumstances of the case other than the needs of the bankrupt<sup>7</sup>. Where, however, such an application is made after the end of the period of one year beginning with the first vesting of the bankrupt's estate in a trustee<sup>8</sup>, the court must assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations<sup>9</sup>.

1 For the meaning of 'dwelling house' see para 401 note 1 ante.

2 Ie the rights conferred by the Insolvency Act 1986 s 337(2)(a): see para 650 head (1) ante.

3 Ibid s 337(3)(a) (substituted by the Family Law Act 1996 s 66(1), Sch 8 para 58).

4 Ie an order under the Family Law Act 1996 s 33: see para 648 ante. The Family Law Act 1996 has effect, with the necessary modifications, as if any charge under the Insolvency Act 1986 s 337(2)(b) (see para 650 head (2) ante) on the estate or interest of the trustee were a charge under the Family Law Act 1996 on the estate or interest of a spouse: Insolvency Act 1986 s 337(3)(c) (substituted by the Family Law Act 1996 Sch 8 para 58).

As to the application of the Insolvency Act 1986 s 337 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 650 note 4 ante.

5 Ibid s 337(3)(b) (substituted by the Family Law Act 1996 Sch 8 para 58).

6 Insolvency Act 1986 s 337(4) (amended by the Family Law Act 1996 Sch 8 para 58). As to the courts having jurisdiction in bankruptcy see paras 6, 7 ante.

7 Insolvency Act 1986 s 337(5) (amended by the Family Law Act 1996 Sch 8 para 58). Cf the criteria set out in the Family Law Act 1996 s 33: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 292.

8 Ie under the Insolvency Act 1986 Pt IX Ch IV (ss 305-335) (as amended): see para 390 et seq ante.

9 Ibid s 337(6). As to 'exceptional circumstances' see para 647 note 7 ante.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 651 Application for possession against bankrupt

TEXT AND NOTES 3, 4--Insolvency Act 1986 s 337(3)(a), (c) amended so as to apply provisions to civil partners: Civil Partnership Act 2004 Sch 9 para 22(3).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(i) Rights of Occupation/652. Payments in respect of premises occupied by bankrupt.

### 652. Payments in respect of premises occupied by bankrupt.

Where any premises comprised in a bankrupt's estate<sup>1</sup> are occupied by him, whether by virtue of the statutory provisions<sup>2</sup> or otherwise, on condition that he makes payments towards satisfying any liability arising under a mortgage of the premises or otherwise towards the outgoings of the premises, the bankrupt does not, by virtue of those payments, acquire any interest in the premises<sup>3</sup>.

1 For the meaning of 'the bankrupt's estate' see para 216 ante.

2 I.e. by virtue of the Insolvency Act 1986 s 337 (as amended): see para 651 ante.

3 Ibid s 338. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 338 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 26. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/A. TRANSACTIONS AT AN UNDERVALUE AND PREFERENCES/653. In general.

## **(ii) Adjustment of prior and other Transactions**

### **A. TRANSACTIONS AT AN UNDERVALUE AND PREFERENCES**

#### **653. In general.**

The following provisions<sup>1</sup> relating to transactions<sup>2</sup> at an undervalue and preferences apply where an individual is adjudged bankrupt<sup>3</sup>.

1 I.e. the provisions set out in para 654 et seq post.

2 For these purposes, except in so far as the context otherwise requires, 'transaction' includes a gift, agreement or arrangement; and references to entering into a transaction are to be construed accordingly: Insolvency Act 1986 s 436. As to the recovery of excessive pension contributions see para 668 et seq post.

3 Ibid ss 339(1), 340(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, ss 339, 340 apply: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 26. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

A preference given, assignment made or other transaction entered into before 29 December 1986 (see para 2 ante) may not be set aside under any of the Insolvency Act 1986 ss 339-344 (as amended) except to the extent that it could have been set aside under the law in force immediately before that day; and, for these purposes, references to setting aside a preference, assignment or other transaction include the making of any order which varies or reverses any effect of a preference, assignment or other transaction: s 437, Sch 11 para 17(1), (2).

**UPDATE****647-706 Effect of bankruptcy on certain rights, transactions etc**

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Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/A. TRANSACTIONS AT AN UNDERVALUE AND PREFERENCES/654. Transactions at an undervalue.

**654. Transactions at an undervalue.**

An individual enters into a transaction<sup>1</sup> with a person<sup>2</sup> at an undervalue if:

- 823 (1) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration;
- 824 (2) he enters into a transaction with that person in consideration of marriage; or
- 825 (3) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual<sup>3</sup>.

The creation by an individual of a charge over his assets in favour of a creditor is not a transaction at an undervalue<sup>4</sup>.

1 For the meaning of 'transaction' and references to entering into a transaction see para 653 note 2 ante.

2 In *Re Paramount Airways Ltd (in administration)* [1993] Ch 223, [1992] 3 All ER 1, CA it was held that the Insolvency Act 1986 s 238, which contains comparable wording to that in s 339, was not territorially limited, nor limited to British citizens. Since, however, the relief to be granted by the court is discretionary, the court would need to be satisfied at the hearing of the application that the defendant was sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element: *Re Paramount Airways Ltd (in administration)* supra at 239, 240 and at 11, 12. See further COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 844.

3 Insolvency Act 1986 s 339(3). Even where, as between transferor and transferee, full consideration is apparently given, there may be a transaction at an undervalue if the interests of a third party are prejudicially affected: *Agricultural Mortgage Corp'n plc v Woodward* [1995] 1 BCLC 1, [1994] BCC 688, CA (decided under the Insolvency Act 1986 s 423; husband who had charged his agricultural holding to the plaintiff as security exercised his powers under the Law of Property Act 1925 s 99 and the Agricultural Holdings Act 1986 s 100, Sch 14 para 12 (see AGRICULTURAL LAND vol 1 (2008) PARA 421) to create a lease in favour of his wife, thus reducing the value of the freehold and placing the wife in a 'ransom position' whereby she could bargain with the bank for payment in consideration of her surrendering the lease); cf *Re Martin Coulter Enterprises Ltd* [1988] BCLC 12, 4 BCC 210 (where the court left open the question whether mere detriment could constitute consideration). See also *Barclays Bank plc v Eustice* [1995] 4 All ER 511, [1995] 1 WLR 1238, CA; *Re Kumar (a bankrupt)*, ex p *Lewis v Kumar* [1993] 2 All ER 700, [1993] 1 WLR 224 (wife's assumption of sole liability for a mortgage was transfer at an undervalue because value of her consideration was significantly less than that provided by husband); *Re Brabon, Treharne v Brabon* [2001] 1 BCLC 11, [2000] BPIR 537 (transaction entered into by the debtor's wife as mortgagee of property owned by the debtor was not a transaction 'entered into' by the debtor for the purposes of the Insolvency Act 1986 s 339; on the sale of the mortgaged property by the mortgagor the value of the consideration was the value of the land free of the mortgage and not the value of the mortgagor's equity of redemption).



A series of transactions may be regarded as a single transaction, if the practical effect of the transactions is as though they were one transaction: *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] UKHL 2, [2001] 1 All ER 673, [2001] 1 WLR 143.

As to the application of the Insolvency Act 1986 s 339 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 653 note 3 ante.

4 *Re MC Bacon Ltd* [1990] BCLC 324, [1990] BCC 78.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 654 Transactions at an undervalue

TEXT AND NOTES--See also *Hill v Haines* [2007] EWCA Civ 1284, [2008] 2 All ER 901.

TEXT AND NOTE 3--1986 Act s 339(3) amended: Civil Partnership Act 2004 Sch 27 para 119.

NOTE 3--When determining the value of a transaction at the date of the transaction regard can be had to subsequent events affecting the value which are relevant and foreseeable at the that date: *Re Thoars; Reid v Ramlort Ltd* [2002] EWHC 2416 (Ch), [2003] 1 BCLC 499. The court is not required to calculate the exact values; if the maximum conceivable value for one party is significantly less than the minimum conceivable value for the other party, the transaction is at an undervalue: *Re Thoars (No 2); Reid v Ramlort Ltd (No 2)* [2004] EWCA Civ 800, [2005] 1 BCLC 331. See also *Re Peppard (a bankrupt); Tomlinson v Harrington* [2009] BPIR 331 (value of property transferred much greater than value of indemnity offered by person of limited means).

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### 655. Remedy in respect of a transaction at an undervalue.

Where an individual has at a relevant time<sup>1</sup> entered into a transaction<sup>2</sup> with any person at an undervalue<sup>3</sup>, the trustee of the bankrupt's estate may apply to the court for an order to restore the position to what it would have been if that individual had not entered into that transaction<sup>4</sup>. On such an application, the court may make such order as it thinks fit for achieving this effect<sup>5</sup>.

1 For the meaning of 'relevant time' see para 660 post.

2 For the meaning of 'transaction' and references to entering into a transaction see para 653 note 2 ante.

3 For the meaning of 'transaction at an undervalue' see para 654 ante.

4 Insolvency Act 1986 s 339(1), (2). As to the application of s 339 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 653 note 3 ante.

5 Ibid s 339(2). As to the orders which may be made see further s 342 (as amended); and para 661 post.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

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### 655 Remedy in respect of a transaction at an undervalue

NOTE 5--Even if a transaction has been entered into at an undervalue, the court retains an overall discretion which is wide enough to enable it to make no order where justice so requires: *Singla v Brown* [2007] EWHC 405 (Ch), [2008] 2 WLR 283.

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### 656. Preference.

An individual gives a preference to a person if:

- 826 (1) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities; and
- 827 (2) the individual does anything or suffers anything to be done which, in either case, has the effect of putting that person in a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done<sup>1</sup>.

1 Insolvency Act 1986 s 340(3). As to acts done in pursuance of court orders see para 659 post. As to the application of s 340 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 653 note 3 ante.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

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BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/A. TRANSACTIONS AT AN UNDERVALUE AND PREFERENCES/657. Remedy in respect of preference; requisite intention.

### **657. Remedy in respect of preference; requisite intention.**

Where an individual has at a relevant time<sup>1</sup> given a preference<sup>2</sup> to any person, the trustee of the bankrupt's estate may apply to the court for an order to restore the position to what it would have been if that individual had not given that preference<sup>3</sup>. On such an application, the court may make such order as it thinks fit for achieving this effect<sup>4</sup>; but the court must not make such an order in respect of a preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire<sup>5</sup> to produce, in relation to that person, the effect of putting that person into a position which, in the event of the individual's bankruptcy, would be better than the position he would otherwise have been in if the individual's act or sufferance had not been done<sup>6</sup>.

1 For the meaning of 'relevant time' see para 660 post.

2 For the meaning of 'give a preference' see para 656 ante.

3 Insolvency Act 1986 s 340(1). As to the orders which may be made see para 661 post. As to the application of s 340 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 653 note 3 ante.

4 Ibid s 340(2).

5 The influence and the desire need have been only part of several motives on the part of the bankrupt. The decision need only be demonstrated to have been influenced by the requisite desire (*Re MC Bacon Ltd* [1990] BCLC 324, [1990] BCC 78; *Re Ledingham-Smith (a bankrupt), ex p Trustee of Bankrupt v Pannell Kerr Forster (a firm)* [1993] BCLC 635). There is no need to show dominant intention. See also *Re DKG Contractors Ltd* [1990] BCC 903; *Re Agriplant Services Ltd (in liquidation)* [1997] 2 BCLC 598 at 609-611, [1997] BCC 842 at 851, 852. The relevant time to consider the existence and the extent of the influence is the time when the decision is made to give the preference (*Re MC Bacon Ltd* supra; *Re Fairway Magazines Ltd, Fairbairn v Hartigan* [1993] BCLC 643, [1992] BCC 924; cf *Wills v Corfe Joinery Ltd (in liquidation)* [1998] 2 BCLC 75, [1997] BCC 511). Case law on the previous statutory provisions is not relevant to the interpretation of the requisite intention under the Insolvency Act 1986 s 340: *Re MC Bacon Ltd* supra.

As to the position where a preference is given to an associate of the bankrupt see the Insolvency Act 1986 s 340(5); and para 658 post.

6 Ibid s 340(3)(b), (4).

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

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### 658. Presumed intention in the case of associate.

An individual who has given a preference<sup>1</sup> to a person who, at the time the preference was given, was an associate<sup>2</sup> of his, otherwise than by reason only of being his employee, is presumed, unless the contrary is shown, to have been influenced in deciding to give it by a desire to produce, in relation to that person, the effect of putting that person in a position which, in the event of the individual's bankruptcy, would be better than the position he would have been in if the individual's act or sufferance had not been done<sup>3</sup>.

1 For the meaning of 'give a preference' see para 656 ante.

2 For the meaning of 'associate' see para 5 ante.

3 Insolvency Act 1986 s 340(4), (5). As to the requisite intention see para 657 ante. As to the effect of s 340(5) on the burden of proof see *Re DKG Contractors Ltd* [1990] BCC 903; *Re Beacon Leisure Ltd* [1992] BCLC 565, [1991] BCC 213; *Re Ledingham-Smith (a bankrupt), ex p Trustee of Bankrupt v Pannell Kerr Forster (a firm)* [1993] BCLC 635; *Re Exchange Travel (Holdings) Ltd (in liquidation)* [1996] BCC 933.

As to the application of the Insolvency Act 1986 s 340 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 653 note 3 ante.

### UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

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### 659. Acts pursuant to court orders.

The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference<sup>1</sup>.

1 Insolvency Act 1986 s 340(6). For the meaning of 'give a preference' see para 656 ante. As to setting aside dispositions of property effected pursuant to orders in matrimonial proceedings see *Burton v Burton* [1986] 2 FLR 419, [1986] Fam Law 330; *Re Flint (a bankrupt)* [1993] Ch 319, [1993] 2 WLR 537; *Harman v Glencross, Glencross v Glencross* [1986] Fam 81, [1986] 1 All ER 545, CA; *Re Abbott (a bankrupt), ex p Trustee of Property of Bankrupt v Abbott* [1983] Ch 45, [1982] 3 All ER 181, DC.

As to the effect of the Matrimonial Causes Act 1973 s 24(1)(c) or (d) (as originally enacted) see *Re Harper (a bankrupt), Harper v O'Reilly* [1998] 3 FCR 475, sub nom *Harper v O'Reilly and Harper* [1997] 2 FLR 816 (beneficial interest in a matrimonial home transferred to the wife, with the result that it was not part of the estate of a husband who was adjudged bankrupt thereafter).

As to the application of the Insolvency Act 1986 s 340 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 653 note 3 ante.

**UPDATE****647-706 Effect of bankruptcy on certain rights, transactions etc**

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**660. The relevant time.**

In order for there to be a remedy in respect of a transaction at an undervalue or the giving of a preference, the time at which an individual entered into a transaction or gave a preference must be a 'relevant time'<sup>1</sup>. If the transaction is entered into or the preference is given at the following times, it is a 'relevant time' for these purposes:

- 828 (1) in the case of a transaction at an undervalue, at a time in the period of five years ending with the day of the presentation of the bankruptcy petition on which the individual is adjudged bankrupt;
- 829 (2) in the case of a preference which is not a transaction at an undervalue and is given to a person who is an associate<sup>2</sup> of an individual, otherwise than by reason only of being his employee, at a time in the period of two years ending with that day; and
- 830 (3) in any other case of a preference which is not a transaction at an undervalue, at a time in the period of six months ending with that day<sup>3</sup>.

Where an individual enters into a transaction at an undervalue or gives a preference at a time mentioned in heads (1), (2) or (3) above, not being, in the case of a transaction at an undervalue, a time less than two years before the end of the period mentioned in head (1) above, that time is not a relevant time unless the individual is insolvent<sup>4</sup> at the time, or becomes insolvent in consequence of the transaction or preference; but these requirements are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by an individual with a person who is an associate of his, otherwise than by reason only of being his employee<sup>5</sup>.

1 See paras 654, 655 (transaction at an undervalue), 656-658 (preference) ante.

2 For the meaning of 'associate' see para 5 ante.

3 Insolvency Act 1986 s 341(1). A transaction entered into or preference given by a person who is subsequently adjudged bankrupt on a petition under s 264(1)(d) (criminal bankruptcy: see para 124 head (4) ante) is to be treated as having been entered into or given at a relevant time for the purposes of ss 339, 340 if it was entered into or given at any time on or after the date specified for the purposes of s 341(4) in the criminal bankruptcy order on which the petition was based: s 341(4). However, no such order may be made under ss 339, 340 by virtue of s 341(4) where an appeal is pending, within the meaning of s 277 (see para 215 ante) against the individual's conviction of any offence by virtue of which the criminal bankruptcy order was made: s 341(5). As to criminal bankruptcy see further para 844 et seq post; and as to the prospective repeal of ss 264(1)(d), 277, 341(4), (5) see para 844 note 2 post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition s 341 applies, save that in s 341(1)(a) (see text head (1) supra) for the words 'day of the presentation of the bankruptcy petition' the words 'date of death of the deceased debtor' are to be substituted: Administration of Insolvent Estates of Deceased Persons Order 1986, 1986/1999, art 3(1), Sch 1 Pt II para 27. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 For these purposes, an individual is insolvent if he is unable to pay his debts as they fall due, or the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities: Insolvency Act 1986 s 341(3).

5 Ibid s 341(2). As to the limitation periods applying to transactions at an undervalue and preferences cf *Re Priory Garage (Walthamstow) Ltd* [2001] BPIR 144 (applications to set aside transactions under ss 238-241 are generally actions on a specialty within the meaning of the Limitation Act 1980 s 8(1) and are subject to a 12-year limitation period; but, where the subject of certain applications under the Insolvency Act 1986 ss 238-241 are not to set aside a transaction but to recover a sum recoverable by virtue of ss 238-241, such applications will be governed by the Limitation Act 1980 s 9(1) and are subject to a six-year limitation period).

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

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#### 661. Orders which may be made.

Without prejudice to the generality of the powers of the court to make orders restoring the position to what it would have been if the individual had not entered into the transaction at an undervalue or given the preference<sup>1</sup>, an order with respect to such transactions or preferences entered into or given by an individual may:

- 831 (1) require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the trustee of the bankrupt's estate as part of that estate;
- 832 (2) require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred;
- 833 (3) release or discharge, in whole or in part, any security given by the individual;
- 834 (4) require any person to pay, in respect of benefits received by him from the individual, such sums to the trustee of his estate as the court may direct;
- 835 (5) provide for any surety or guarantor whose obligations to any person were released or discharged, in whole or in part, under the transaction, or by the giving of the preference, to be under such new or revived obligations to that person as the court thinks appropriate;
- 836 (6) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or

- charge released or discharged, in whole or in part, under the transaction or by the giving of the preference;
- 837 (7) provide for the extent to which any person whose property is vested by the order in the trustee of the bankrupt's estate, or on whom obligations are imposed by the order, is to be able to prove in the bankruptcy for debts or other liabilities which arose from, or were released or discharged, in whole or in part, under or by, the transaction or the giving of the preference<sup>2</sup>.

1 le under the Insolvency Act 1986 s 339(2) (see para 655 ante) or s 340(2) (see para 657 ante).

2 Ibid s 342(1). Any sums required to be paid to the trustee in accordance with an order under s 339 or s 340 are to be comprised in the bankrupt's estate: s 342(3).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 342 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

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### 662. Effect of order on third parties.

An order made by the court under the above provisions<sup>1</sup> may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the individual in question entered into the transaction or, as the case may be, the person to whom the preference was given; but such an order:

- 838 (1) must not prejudice any interest in property which was acquired from a person other than that individual and was acquired in good faith and for value, or prejudice any interest deriving from such an interest; and
- 839 (2) must not require a person who received a benefit from the transaction or preference in good faith and for value to pay a sum to the trustee of the bankrupt's estate, except where he was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of that individual<sup>2</sup>.

Where a person has acquired an interest in property from a person other than the individual in question, or has received a benefit from the transaction or preference, and at the time of that acquisition or receipt:

- 840 (a) he had notice of the relevant surrounding circumstances<sup>3</sup> and of the relevant proceedings<sup>4</sup>; or
- 841 (b) he was an associate<sup>5</sup> of, or was connected with<sup>5</sup>, either the individual in question or the person with whom that individual entered into the transaction or to whom that individual gave the preference,

then, unless the contrary is shown, it is to be presumed for the purposes of head (1) above or, as the case may be, head (2) above, that the interest was acquired or the benefit was received otherwise than in good faith<sup>6</sup>.

1     le an order under the Insolvency Act 1986 s 339 (transactions at an undervalue: see paras 653-655 ante) or s 340 (preferences: see paras 656-659 ante).

2     Ibid s 342(2) (substituted by the Insolvency (No 2) Act 1994 s 2). The Insolvency Act 1986 s 342(2) (as so substituted) has effect only in relation to interests acquired and benefits received on or after 26 July 1994: Insolvency (No 2) Act 1994 s 6(2), (3). Thus, in relation to transactions prior to that date, the Insolvency Act 1986 s 342(2) (as originally enacted) will still apply, ie an order made by the court under s 339 and s 340 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the individual in question entered into the transaction or, as the case may be, the person to whom the preference was given; but such an order may not prejudice any interest in property which was acquired from a person other than the individual and was acquired in good faith, for value and without notice of the relevant circumstances (see note 3 infra), or prejudice any interest deriving from such an interest; nor may any such order require a person who received a benefit from the transaction or preference in good faith, for value and without notice of the relevant circumstances to pay a sum to the trustee of the bankrupt's estate, except where that person was a party to the transaction, or the payment is to be in respect of a preference given to that person at a time when he was a creditor of that individual (see note 6 infra).

The amendments of the Insolvency Act 1986 made by the Insolvency (No 2) Act 1994 bind the Crown: s 5(1).

As to the application of the Insolvency Act 1986 s 342 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 661 note 2 ante.

3     For these purposes, the relevant surrounding circumstances are, as the case may require: (1) the fact that the individual in question entered into the transaction at an undervalue; or (2) the circumstances which amounted to the giving of the preference by the individual in question: *ibid* s 342(4) (substituted by the Insolvency (No 2) Act 1994 s 2(3)).

The Insolvency Act 1986 s 342(4) (as so substituted) has effect only in relation to interests acquired and benefits received on or after 26 July 1994: Insolvency (No 2) Act 1994 s 6(2), (3). Thus, in relation to transactions prior to that date, the Insolvency Act 1986 s 342(4) (as originally enacted) will still apply, ie the relevant circumstances, in relation to a transaction or preference, are: (a) the circumstances by virtue of which an order under s 339 or s 340 could be made in respect of the transaction or preference if the individual in question were adjudged bankrupt within a particular period after the transaction is entered into or the preference given; and (b) if that period has expired, the fact that that individual has been adjudged bankrupt within that period: s 342(4) (as originally enacted).

4     For these purposes, a person has notice of the relevant proceedings if he has notice: (1) of the fact that the petition on which the individual in question is adjudged bankrupt has been presented; or (2) of the fact that the individual in question has been adjudged bankrupt: *ibid* s 342(5) (substituted by the Insolvency (No 2) Act 1994 s 2(3)).

5     The Insolvency Act 1986 s 249 (meaning of connected persons and associates: see para 5 ante) applies for these purposes as it applies for the purposes and provisions of Pts I-VII (ss 1-251 (as amended): see *COMPANY AND PARTNERSHIP INSOLVENCY*): s 342(6) (substituted by the Insolvency (No 2) Act 1994 s 2(3)).

6     Insolvency Act 1986 s 342(2A) (added by the Insolvency (No 2) Act 1994 s 2(2)). The Insolvency Act 1986 s 342(2A) (as so added) has effect only in relation to interests acquired and benefits received on or after 26 July 1994: Insolvency (No 2) Act 1994 s 6(2), (3). Thus, in relation to transactions prior to that date, the Insolvency Act 1986 s 342(2) (as originally enacted) will still apply: see note 2 supra.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc



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## ***B. TRANSACTIONS DEFRAUDING CREDITORS***

### **663. In general.**

Transactions at an undervalue entered into by an individual may also be avoided under the statutory provisions<sup>1</sup> whether or not the individual is subject to the insolvency procedures under the Insolvency Act 1986<sup>2</sup>, provided that the transaction in question has been entered into with the requisite intention<sup>3</sup>. Whereas victims of the transaction may in certain instances apply for orders avoiding such transactions, there are restrictions on the persons who may apply<sup>4</sup>.

1     I.e. the Insolvency Act 1986 ss 423-425: see para 664 et seq post. These provisions also apply, with certain modifications, to transactions entered into by companies: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 854-855. A transaction entered into before 29 December 1986 (see para 2 ante) cannot be set aside, nor may any order be made varying or reversing such transaction under these provisions except to the extent that it could have been set aside under the law in force immediately before that day: s 437, Sch 11 para 20(1), (2).

2     Cf para 653 et seq ante.

3     See para 664 post. In the case of such transactions there are no restrictions as to the time a transaction at an undervalue may be subject to avoidance such as are referred to in para 660 ante.

4     See para 665 post.

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **664. Transactions defrauding creditors; requisite intention.**

Where a person<sup>1</sup> enters into a transaction at an undervalue, the court<sup>2</sup> may make such order as it thinks fit for restoring the position to what it would have been if the transaction had not been entered into, and<sup>3</sup> protecting the interests of persons who are victims<sup>4</sup> of the transaction<sup>5</sup>. For these purposes, a person enters into such a transaction with another person if:

- 842 (1) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
- 843 (2) he enters into a transaction with the other in consideration of marriage; or
- 844 (3) he enters into a transaction with the other for a consideration, the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself<sup>6</sup>.

However, in the case of a person entering into such a transaction, an order must only be made if the court is satisfied that it was entered into by him for the purpose:

- 845 (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him; or
- 846 (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make<sup>7</sup>.

Where the respondent has received legal advice in relation to the transaction, the applicant may be able to obtain disclosure of documents which would prima facie be subject to legal professional privilege<sup>8</sup>.

1 Unless the contrary intention appears, 'person' includes a body of persons corporate or unincorporate: Interpretation Act 1978 ss 5, 22(1), 23(1), Sch 1, Sch 2 para 4(1)(a). Semble the Insolvency Act s 423 is extra-territorial in its effect: *Re Paramount Airways Ltd (in administration)* [1993] Ch 223, [1992] 3 All ER 1, CA.

2 For these purposes, 'the court' means the High Court or, if the person entering into the transaction is a body capable of being wound up under the Insolvency Act 1986 Pt IV (ss 73-219) or Pt V (ss 220-229) (as amended), any other court having jurisdiction to wind it up: s 423(4)(b). See further COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 854. Where the person entering into the transaction is an individual, 'the court' means the High Court or any other court which would have jurisdiction in relation to a bankruptcy petition relating to him: s 423(4)(a). As to such courts see paras 6, 7 ante. The application may be made to any part of the High Court: *TSB Bank plc v Katz* [1997] BPIR 147; cf *Moon v Franklin* [1996] BPIR 196. Where the application is made to the High Court other than in the exercise of its insolvency jurisdiction, the Insolvency Rules 1986, SI 1986/1925 (as amended) do not apply to the proceedings: *Aiglon Ltd and L'Aiglon SA v Gau Shan Co Ltd, Gau Shan Co Ltd v Aiglon Ltd* [1993] BCLC 1321; *TSB Bank plc v Katz* supra; *Jyske Bank (Gibraltar) Ltd v Spejeldnaes* (1997) Times, 10 October; *Banca Carige SpA Cassa di Risparmio Genova e Imperia v Banco Nacional de Cuba* [2001] 3 All ER 923, sub nom *Re Banco Nacional de Cuba* [2001] 1 WLR 2039 (claim under the Insolvency Act 1986 s 423 does not fall within CPR 6.19(2); permission to serve proceedings out of jurisdiction required).

3 The word 'and' is to be read conjunctively: *Chohan v Saggar* [1994] 1 BCLC 706, [1994] BCC 134, CA.

4 In relation to a transaction at an undervalue, references in the Insolvency Act 1986 ss 423, 424 to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it: s 423(5). A person who cannot demonstrate that he will be worse off as a result of the transaction is not a victim, eg where the only assets of the transferor are fully charged: *Pinewood Joinery (a firm) v Starelm Properties Ltd* [1994] 2 BCLC 412, [1994] BCC 569; cf *Barclays Bank plc v Eustice* [1995] 4 All ER 511, [1995] 1 WLR 1238, CA. A claimant in proceedings who has a chance of success is a 'victim' within the meaning of the Insolvency Act 1986 s 423(5): *Pinewood Joinery (a firm) v Starelm Properties Ltd* supra.

An order protecting the interests of the victims need not restore the position to what it would have been had the transaction not been made: *Moon v Franklin* [1996] BPIR 196.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 423 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 Insolvency Act 1986 s 423(2). A transaction can be at an undervalue for the purposes of s 423 where it causes prejudice to a single creditor falling within s 423(3), notwithstanding that it did not diminish the debtor's assets and the creditors as a whole were not disadvantaged: *National Westminster Bank plc v Jones* [2001] 1 BCLC 98.

6 Insolvency Act 1986 s 423(1). See *Re MC Bacon Ltd* [1990] BCLC 324, [1990] BCC 78 (decided under the Insolvency Act 1986 s 238); *National Bank of Kuwait v Menzies* [1994] 2 BCLC 306, sub nom *Menzies v National Bank of Kuwait SAK* [1994] BCC 119, CA. The incidental detriment accruing to the debtor from the transaction cannot be regarded as consideration: *Agricultural Mortgage Corp plc v Woodward* [1995] 1 BCLC 1, [1994] BCC 688, CA; cf *Barclays Bank plc v Eustice* [1995] 4 All ER 511, [1995] 1 WLR 1238, CA. Even where, as between transferor and transferee, full consideration is apparently given, there may be a transaction at an undervalue if the interests of a third party are prejudicially affected: *Agricultural Mortgage Corp plc v Woodward* supra. As to the position where a company enters into a transaction at an undervalue see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 853-856.

7 Insolvency Act 1986 s 423(3). A person cannot contend that his purpose falls outside the relevant purpose of s 423(3) simply by pointing to another purpose, such as the benefit of his family, friends, or the advantage of business associates: *Chohan v Saggar* [1994] 1 BCLC 706, [1994] BCC 134, CA; *Royscot Spa Leasing Ltd v Lovett* [1995] BCC 502, CA; *Barclays Bank plc v Eustice* [1995] 4 All ER 511, [1995] 1 WLR 1238, CA. It appears that the applicant must show that the relevant purpose was the dominant purpose behind the transaction: *Chohan v Saggar* supra; cf *Pinewood Joinery (a firm) v Starelm Properties Ltd* [1994] 2 BCLC 412, [1994] BCC 569; *Midland Bank plc v Wyatt* [1997] 1 BCLC 242, [1996] BPIR 288. An applicant under the Insolvency Act s 423 does not need to prove dishonesty or fraud; even if made after taking legal advice, and with honest motive, it may be set aside if the relevant purpose is established: *Arbuthnot Leasing International Ltd v Havelet Ltd (No 2)* [1990] BCC 636. See also *Re Brabon, Treharne v Brabon* [2001] 1 BCLC 11, [2000] BPIR 537 (it is sufficient for the purposes of the Insolvency Act 1986 s 423 to show that it was a substantial purpose of the debtor to put assets beyond the reach of a person who was making or might at some time have made a claim against him; and it is not necessary to show that this was the dominant purpose); cf *Banca Carige SpA Cassa di Risparmio Genova e Imperia v Banco Nacional de Cuba* [2001] 3 All ER 923, sub nom *Re Banco Nacional de Cuba* [2001] 1 WLR 2039.

8 *Barclays Bank plc v Eustice* [1995] 4 All ER 511, [1995] 1 WLR 1238, CA; *Royscot Spa Leasing Ltd v Lovett* [1995] BCC 502, CA.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 664 Transactions defrauding creditors; requisite intention

NOTE 5--In determining whether to grant relief, the court might take into account the mental state of the transferee and the degree of his involvement in the fraudulent scheme to put assets out of the reach of the creditors: *4 Eng Ltd v Harper (No 2)* [2009] EWHC 2633 (Ch), (2009) Times, 6 November.

TEXT AND NOTE 6--1986 Act s 423(1) amended: Civil Partnership Act 2004 Sch 27 para 121.

NOTE 7--Putting assets beyond the reach of a potential claimant must be a purpose, rather than a mere consequence, of the transaction, but it does not have to be the dominant purpose: *IRC v Hashmi* [2002] EWCA Civ 981, [2002] 2 BCLC 489. See also *Secretary of State for Environment, Food and Rural Affairs v Feakins* [2005] EWCA Civ 1513, [2005] All ER (D) 153 (Dec); *Kali Ltd v Chawla*; *Advani v Chawla* [2007] EWHC 2357 (Ch), [2008] BPIR 415, [2007] All ER (D) 90 (Sep).

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### **665. Who may apply.**

An application for any order under the above provisions<sup>1</sup> may not be made in relation to a transaction except:

- 847 (1) in a case where the debtor<sup>2</sup> has been adjudged bankrupt, by the official receiver, by the trustee of the bankrupt's estate or, with the permission of the court, by a victim<sup>3</sup> of the transaction<sup>4</sup>;
- 848 (2) in a case where the victim of the transaction is bound by a voluntary arrangement<sup>5</sup>, by the supervisor of the voluntary arrangement or by any person who, whether or not so bound, is such a victim; or
- 849 (3) in any other case, by a victim of the transaction<sup>6</sup>.

An application made under any of the above provisions is to be treated as made on behalf of every victim of the transaction<sup>7</sup>.

<sup>1</sup> I.e. the Insolvency Act 1986 s 423: see para 664 ante.

<sup>2</sup> In relation to a transaction at an undervalue, the person entering into the transaction is referred to in *ibid* ss 424, 425 as 'the debtor': s 423(5).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, ss 423, 424 (see *infra*) apply: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

<sup>3</sup> For the meaning of 'victim' see para 664 note 4 ante.

<sup>4</sup> In the case where the debtor is a body corporate which is being wound up or in relation to which an administration order is in force, the application may be made by the official receiver, by the liquidator or the administrator of the body corporate or, with the permission of the court, by a victim of the transaction: see the Insolvency Act 1986 s 424(1)(a); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 855. The requisite permission of the court must be obtained by a victim before initiating proceedings: *National Bank of Kuwait v Menzies* [1994] 2 BCLC 306, sub nom *Menzies v National Bank of Kuwait SAK* [1994] BCC 119, CA.

<sup>5</sup> I.e. a voluntary arrangement approved under the Insolvency Act 1986 Pt VIII (ss 252-263) (see para 81 et seq ante) or, in the case of a body corporate, under Pt I (ss 1-7) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1169 et seq).

<sup>6</sup> *Ibid* s 424(1). As to the mode of application and the procedure see para 764 et seq post; and as to the court to which application should be made see para 664 note 2 ante.

<sup>7</sup> *Ibid* s 424(2). As to the orders which may be made for the benefit of all persons on whose behalf the application for the order is treated as made see para 666 post.

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## 665 Who may apply

NOTE 4--Leave of the court to continue the proceedings is not required where an individual or company against whom the application was made has been adjudged bankrupt or has become insolvent after the commencement of proceedings: *Godfrey v Torpy* [2007] EWHC 919 (Ch), [2007] BPIR 1538.

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## 666. Orders which may be made.

Without prejudice to the generality of the above provisions<sup>1</sup>, an order made with respect to a transaction entered into at an undervalue may<sup>2</sup>:

- 850 (1) require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made<sup>3</sup>;
- 851 (2) require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of money so transferred;
- 852 (3) release or discharge, in whole or in part, any security<sup>4</sup> given by the debtor<sup>5</sup>;
- 853 (4) require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;
- 854 (5) provide for any surety or guarantor whose obligations to any person were released or discharged, in whole or in part, under the transaction to be under such new or revived obligations as the court thinks appropriate;
- 855 (6) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged, in whole or in part, under the transaction<sup>6</sup>.

1    Ie the Insolvency Act 1986 s 423: see para 664 et seq ante.

2    Ie subject to ibid s 425(2): see para 667 post.

3    See para 665 ante.

4    For these purposes 'security' means any mortgage, charge, lien or other security: Insolvency Act 1986 s 425(4).

5    For the meaning of 'the debtor' see para 665 note 2 ante.

6    Insolvency Act 1986 s 425(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 425 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## UPDATE

## 647-706 Effect of bankruptcy on certain rights, transactions etc

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### **667. Effect on third parties.**

An order made under the above provisions<sup>1</sup> may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor<sup>2</sup> entered into the transaction; but such an order:

856 (1) must not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances<sup>3</sup>, or prejudice any interest deriving from such an interest; and

857 (2) must not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction<sup>4</sup>.

1    le an order under the Insolvency Act 1986 s 423: see para 664 ante.

2    For the meaning of 'the debtor' see para 665 note 2 ante.

3    For these purposes the relevant circumstances in relation to a transaction are the circumstances by virtue of which an order under the Insolvency Act 1986 s 423 (see para 664 ante) may be made in respect of the transaction: s 425(3). As to the application of s 425 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 666 note 6 ante.

4    Ibid s 425(2). The court is required, as far as possible, to make an order to do justice between victims and third parties: *Chohan v Saggar* [1994] 1 BCLC 706, [1994] BCC 134, CA. See also *Ashe v Mumford* [2001] BPIR 1, CA (whole of property purchased with loan from bankrupt by person benefiting from right to buy at discount ordered to be vested in trustee in bankruptcy, notwithstanding lack of evidence of borrower's state of mind); *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd (No 2)* [1990] BCC 636 (property ordered to be held on trust without prejudice to the claims of subsequent creditors).

### **UPDATE**

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Transactions/C. RECOVERY OF EXCESSIVE PENSION CONTRIBUTIONS/(A) Approved and Unapproved Pension Arrangements/668. Recovery of excessive pension contributions.

### ***C. RECOVERY OF EXCESSIVE PENSION CONTRIBUTIONS***

#### **(A) APPROVED AND UNAPPROVED PENSION ARRANGEMENTS**

##### **668. Recovery of excessive pension contributions.**

Where an individual who is adjudged bankrupt has rights under an approved pension arrangement<sup>1</sup> or has excluded rights under an unapproved pension arrangement<sup>2</sup>, the trustee of the bankrupt's estate may apply to the court for an order under the following provisions<sup>3</sup>.

If the court is satisfied:

- 858 (1) that the rights under the arrangement are to any extent, and whether directly or indirectly, the fruits of relevant contributions<sup>4</sup>; and
- 859 (2) that the making of any of the relevant contributions ('the excessive contributions') has unfairly prejudiced the individual's creditors,

the court may make such order as it thinks fit for restoring the position to what it would have been had the excessive contributions not been made<sup>5</sup>.

Where the court is satisfied that the value of the rights under the arrangement is, as a result of the rights of the individual under the arrangement or under any other pension arrangement having at any time become subject to a debit<sup>6</sup> giving effect to pension sharing, less than it would otherwise have been:

- 860 (a) any relevant contributions which were represented by the rights which became subject to the debit are to be taken<sup>7</sup> to be contributions of which the rights under the arrangement are the fruits; and
- 861 (b) where the relevant contributions represented by the rights under the arrangement, including those so represented by virtue of head (a) above, are not all excessive contributions, relevant contributions which are represented by the rights under the arrangement otherwise than by virtue of head (a) above are to be treated as excessive contributions before any which are so represented by virtue of head (a) above<sup>8</sup>.

In determining whether the court is satisfied under head (2) above, it must consider, in particular:

- 862 (i) whether any of the contributions were made for the purpose of putting assets beyond the reach of the individual's creditors or any of them; and
- 863 (ii) whether the total amount of any contributions made by or on behalf of the individual to pension arrangements and represented, whether directly or indirectly, by rights under approved pension arrangements or excluded rights under unapproved pension arrangements<sup>9</sup>,

is an amount which is excessive in view of the individual's circumstances when those contributions were made<sup>10</sup>.

The person responsible<sup>11</sup> for:

- 864 (A) an approved pension arrangement under which a bankrupt has rights;
- 865 (B) an unapproved pension arrangement under which a bankrupt has excluded rights; or
- 866 (C) a pension arrangement under which a bankrupt has at any time had rights,

must, on the bankrupt's trustee in bankruptcy making a written request, provide the trustee with such information about the arrangement and rights as the trustee may reasonably require for or in connection with the making of an application for an order for the recovery of excessive pension contributions<sup>12</sup>. Where such a request for information has been made to the responsible person by the bankrupt's trustee in bankruptcy and relating to the cash equivalent of a bankrupt's rights or excluded rights, the responsible person must comply with that request within a period of nine weeks beginning with the day on which it is received<sup>13</sup>.

Where any sum is required by such an order to be paid to the trustee in bankruptcy, that sum is comprised in the bankrupt's estate<sup>14</sup>.

1 For these purposes, 'approved pension arrangement' has the same meaning as in the Welfare Reform and Pensions Act 1999 s 11(2) (see SOCIAL SECURITY AND PENSIONS): Insolvency Act 1986 s 342A(8) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15). See also the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 2; and SOCIAL SECURITY AND PENSIONS. For the date on which the Welfare Reform and Pensions Act 1999 s 11(2) and the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, respectively came into force see para 395 note 3 ante. The Welfare Reform and Pensions Act 1999 s 15 entered fully into force on 6 April 2002: see s 89(5); and the Welfare Reform and Pensions Act 1999 (Commencement No 13) Order 2002, SI 2002/153, art 2(e).

2 For these purposes, 'unapproved pension arrangement' has the same meaning as in the Welfare Reform and Pensions Act 1999 s 12 (see SOCIAL SECURITY AND PENSIONS): Insolvency Act 1986 s 342A(8) (as added and substituted: see note 1 supra). See further the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 3; and SOCIAL SECURITY AND PENSIONS.

3 Welfare Reform and Pensions Act 1999 s 342A(1) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 342A (as added and substituted) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 For these purposes, 'relevant contributions' means contributions to the arrangement or any other pension arrangement which the individual has at any time made on his own behalf or which have at any time been made on his behalf: Insolvency Act 1986 s 342A(5) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

5 Insolvency Act 1986 s 342A(2) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15). As to the contents of such an order see para 669 post. Nothing in: (1) any provision of the Pension Schemes Act 1993 s 159 (as amended) or the Pensions Act 1995 s 91 (as amended) (which prevent assignment and the making of orders that restrain a person from receiving anything which he is prevented from assigning: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) paras 928, 865 respectively); (2) any provision of any enactment, whether passed or made before or after the passing of the Welfare Reform and Pensions Act 1999, corresponding to any of the provisions mentioned in head (1) supra; or (3) any provision of the arrangement in question corresponding to any of those provisions, applies to a court exercising its powers under the Insolvency Act 1986 s 342A (as added and substituted): s 342C(2) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 342C (as added and substituted) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 28.

6 Ie under the Welfare Reform and Pensions Act 1999 s 29(1)(a): see SOCIAL SECURITY AND PENSIONS.

7 Ie for the purposes of the Insolvency Act 1986 s 342A(2) (as added and substituted): see supra.



8 Ibid s 342A(3), (4) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

9 For these purposes, rights of an individual under an unapproved pension arrangement are excluded rights if they are rights which are excluded from his estate by virtue of regulations under the Welfare Reform and Pensions Act 1999 s 12 (see SOCIAL SECURITY AND PENSIONS); Insolvency Act 1986 s 342A(7) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

10 Insolvency Act 1986 s 342A(6) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

11 For these purposes, references to the person responsible for a pension arrangement are to: (1) the trustees, managers or provider of the arrangement; or (2) the person having functions in relation to the arrangement corresponding to those of a trustee, manager or provider: Insolvency Act 1986 s 342C(6) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

12 Insolvency Act 1986 s 342C(1) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

13 Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 10(1)(c)(i).

14 Insolvency Act 1986 s 342C(3) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

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### 669. Contents of orders.

An order for the recovery of excessive pension contributions<sup>1</sup> may<sup>2</sup> include provision:

- 867 (1) requiring the person responsible for the arrangement<sup>3</sup> to pay an amount to the individual's trustee in bankruptcy;
- 868 (2) adjusting the liabilities of the arrangement in respect of the individual<sup>4</sup>;
- 869 (3) adjusting any liabilities of the arrangement<sup>5</sup> in respect of any other person that derive, directly or indirectly, from rights of the individual under the arrangement;
- 870 (4) for the recovery by the person responsible for the arrangement, whether by deduction from any amount which that person is ordered to pay or otherwise, of costs incurred by that person in complying in the bankrupt's case with any relevant requirement<sup>6</sup> or in giving effect to the order<sup>7</sup>.

The maximum amount which the person responsible for an arrangement may be required to pay by such an order is the lesser of:

- 871 (a) the amount of the excessive contributions<sup>8</sup>; and
- 872 (b) the value of the individual's rights under the arrangement, if the arrangement is an approved pension arrangement<sup>9</sup>, or of his excluded rights<sup>10</sup> under the arrangement, if the arrangement is an unapproved pension arrangement<sup>11</sup>.

An order for the recovery of excessive pension contributions which requires the person responsible for an arrangement to pay an amount ('the restoration amount') to the individual's trustee in bankruptcy must provide for the liabilities of the arrangement to be correspondingly reduced<sup>12</sup>.

An order for the recovery of excessive pension contributions in respect of an arrangement is binding on the person responsible for the arrangement and overrides provisions of the arrangement to the extent that they conflict with the provisions of the order<sup>13</sup>.

1     Ie an order under the Insolvency Act 1986 s 342A (as added and substituted): see para 668 ante.

2     Ie without prejudice to the generality of *ibid* s 342A(2) (as added and substituted): see para 668 ante.

3     For the meaning of references to the person responsible for a pension arrangement see para 668 note 11 ante.

4     For these purposes, references to adjusting the liabilities of the arrangement in respect of a person include, in particular, reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement: Insolvency Act 1986 s 342B(2) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15). For the date on which the Welfare Reform and Pensions Act 1999 s 15 entered fully into force see para 668 note 1 ante. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 342B (as added and substituted) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 28.

5     For these purposes only, the reference to liabilities of the arrangement does not include liabilities in respect of a person which result from giving effect to an order or provision falling within the Welfare Reform and Pensions Act 1999 s 28(1) (pension sharing orders and agreements: see SOCIAL SECURITY AND PENSIONS): Insolvency Act 1986 s 342B(3) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

6     Ie any requirement under the Insolvency Act 1986 s 342C(1) (as added and substituted): see para 668 ante.

7     *Ibid* s 342B(1) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

8     For the meaning of 'the excessive contributions' see para 668 ante.

9     For the meaning of 'approved pension arrangement' see para 668 note 1 ante.

10    For the meaning of 'excluded rights' see para 668 note 9 ante.

11    Insolvency Act 1986 s 342B(4) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15). For the meaning of 'unapproved pension arrangement' see para 668 note 2 ante. Regulations may make provision about the calculation and verification of any such value as is mentioned in the Insolvency Act 1986 s 342B(4)(b) (as so added and substituted) (see text head (b) *supra*): s 342C(4)(a) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15). The power conferred by the Insolvency Act 1986 s 342C(4) (as so added and substituted) includes power to provide for calculation and verification: (1) in such manner as may, in the particular case, be approved by a prescribed person; or (2) in accordance with guidance from time to time prepared by a prescribed person and approved by the Secretary of State: s 342C(5) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15). For these purposes, 'prescribed' means prescribed by regulations; and 'regulations' means regulations made by the Secretary of State: Insolvency Act 1986 s 342C(7) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15). Such regulations may make different provision for different cases and may contain such incidental, supplemental and

transitional provisions as appear to the Secretary of State necessary or expedient; and they must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Insolvency Act 1986 s 342C(8), (9) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15). In exercise of the power so conferred the Secretary of State made the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 7 (see *infra*) which came into force on 6 April 2002: reg 1(1).

Accordingly, for the purposes of the Insolvency Act 1986 s 342B(4)(b) (see text head (b) *supra*), the value of the individual's ('the bankrupt's') rights under an approved pension arrangement, or of his excluded rights under an unapproved pension arrangement, is the cash equivalent of those rights verified in accordance with the following provisions: Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 7(1). In calculating and verifying the cash equivalent of the rights referred to in reg 7(1), the Pensions on Divorce etc (Provision of Information) Regulations 2000, SI 2000/1048, reg 3 (information about pensions and divorce; valuation of pension benefits: see SOCIAL SECURITY AND PENSIONS) has effect for these purposes in like manner to that in which it has effect for the valuation of benefits in connection with the supply of information in connection with domestic and overseas divorces etc in England and Wales and Northern Ireland for the purposes of the Pensions on Divorce etc (Provision of Information) Regulations 2000, SI 2000/1048 (as amended); and, for these purposes, 'the date on which the request for the valuation was received' is to be read as 'the date on which the trustee in bankruptcy's request for the valuation was received': Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 7(2).

As to the application of the Insolvency Act 1986 s 342C (as added and substituted) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 668 note 5 *ante*.

12 Ibid s 342B(5) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15). For these purposes, liabilities are correspondingly reduced if the difference between: (1) the amount of the liabilities immediately before the reduction; and (2) the amount of the liabilities immediately after the reduction, is equal to the restoration amount: Insolvency Act 1986 s 342B(6) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15). Regulations may make provision about the calculation and verification of any such amounts as are mentioned in the Insolvency Act 1986 s 342B(6)(a), (b) (as so added and substituted) (see heads (1), (2) *supra*): s 342C(4)(b) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15). At the date at which this volume states the law no such regulations had been made. See also note 11 *supra*.

13 Insolvency Act 1986 s 342B(7) (added by the Pensions Act 1995 s 95(1); substituted by the Welfare Reform and Pensions Act 1999 s 15).

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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NOTE 11--1986 Act s 342C(5) amended: Pensions Act 2007 Sch 5 para 3.

SI 2002/836 reg 7(2) amended: SI 2005/2877. SI 2000/1048 reg 3 amended: SI 2007/60.

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## (B) PENSION SHARING CASES

**670. Recovery of excessive pension contributions in pension sharing cases.**

A pension sharing transaction<sup>1</sup> is to be taken<sup>2</sup>:

- 873 (1) to be a transaction, entered into by the transferor<sup>3</sup> with the transferee<sup>4</sup>, by which the appropriate amount<sup>5</sup> is transferred by the transferor to the transferee; and
- 874 (2) to be capable of being a transaction entered into at an undervalue only so far as it is a transfer of so much of the appropriate amount as is recoverable<sup>6</sup>.

A pension sharing transaction is to be taken<sup>7</sup>:

- 875 (a) to be something, namely a transfer of the appropriate amount to the transferee, done by the transferor; and
- 876 (b) to be capable of being a preference given to the transferee only so far as it is a transfer of so much of the appropriate amount as is recoverable<sup>8</sup>.

If, on an application to the court on the ground that a transaction is a transaction at an undervalue or a preference<sup>9</sup>, any question arises as to whether, or the extent to which, the appropriate amount in the case of a pension sharing transaction is recoverable, the question must be determined in accordance with the following provisions<sup>10</sup>.

The court must first determine the extent, if any, to which the transferor's rights under the shared arrangement<sup>11</sup> at the time of the transaction appear to have been, whether directly or indirectly, the fruits of contributions ('personal contributions') which the transferor has at any time made on his own behalf, or which have at any time been made on the transferor's behalf, to the shared arrangement or any other pension arrangement<sup>12</sup>.

Where it appears that those rights were to any extent the fruits of personal contributions, the court must then determine the extent, if any, to which those rights appear to have been the fruits of personal contributions whose making has unfairly prejudiced the transferor's creditors ('the unfair contributions')<sup>13</sup>.

If it appears to the court that the extent to which those rights were the fruits of the unfair contributions is such that the transfer of the appropriate amount could have been made out of rights under the shared arrangement which were not the fruits under the unfair contributions, the appropriate amount is not recoverable<sup>14</sup>.

If it appears to the court that the transfer could not have been wholly so made, the appropriate amount is recoverable to the extent to which it appears to the court that the transfer could not have been so made<sup>15</sup>.

In making its determination<sup>16</sup>, the court must consider, in particular:

- 877 (i) whether any of the personal contributions were made for the purpose of putting assets beyond the reach of the transferor's creditors or any of them; and
- 878 (ii) whether the total amount of any personal contributions represented, at the time the pension sharing transaction was made, by rights under pension arrangements is an amount which is excessive in view of the transferor's circumstances when those contributions were made<sup>17</sup>.

On the transferor's trustee in bankruptcy making a written request to the person responsible for the destination arrangement<sup>18</sup>, that person must provide the trustee with such information about the arrangement, the transferee's rights under it and, where the destination

arrangement is the shared arrangement, the transferor's rights under it, as the trustee may reasonably require for or in connection with the making of an application to the court on the ground that a transaction is a transaction at an undervalue or a preference<sup>19</sup>.

Where the shared arrangement is not the destination arrangement, the person responsible for the shared arrangement must, on the transferor's trustee in bankruptcy making a written request to that person, provide the trustee with such information about the arrangement and the transferor's rights under it as the trustee may reasonably require for or in connection with the making of an application to the court on the ground that a transaction is a transaction at an undervalue or a preference<sup>20</sup>.

On the transferor's trustee in bankruptcy making a written request to the person responsible for any intermediate arrangement<sup>21</sup>, that person must provide the trustee with such information about the arrangement and the transferor's rights under it as the trustee may reasonably require for or in connection with the making of an application to the court on the ground that a transaction is a transaction at an undervalue or a preference<sup>22</sup>.

Where a request for information has been made to the responsible person by the bankrupt's trustee in bankruptcy<sup>23</sup> and relating to the cash equivalent of a transferee's rights under a destination arrangement, the responsible person must comply with that request within a period of nine weeks beginning with the day on which it is received<sup>24</sup>.

1 For these purposes, 'pension sharing transaction' means an order or provision falling within the Welfare Reform and Pensions Act 1999 s 28(1) (see SOCIAL SECURITY AND PENSIONS): Insolvency Act 1986 s 342D(9) (added by the Welfare Reform and Pensions Act 1999 s 84(1), Sch 12 paras 70, 71). The Welfare Reform and Pensions Act 1999 s 84(1), so far as relating to Sch 12 paras 70, 71, and Sch 12 paras 70, 71 came into force on 26 March 2002 for the purpose of making regulations and on 6 April 2002 for all other purposes: Welfare Reform and Pensions Act 1999 (Commencement No 15) Order 2002, SI 2002/818, art 3(a), (b).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 342D (as added) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

2 Ie for the purposes of the Insolvency Act 1986 s 339, s 341 and s 342: see para 653 et seq ante. Nothing in: (1) any provision of the Pension Schemes Act 1993 s 159 (as amended) or the Pensions Act 1995 s 91 (as amended) (which prevent assignment and the making of orders that restrain a person from receiving anything which he is prevented from assigning: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) paras 928, 865 respectively); (2) any provision of any enactment, whether passed or made before or after the passing of the Welfare Reform and Pensions Act 1999, corresponding to any of the provisions mentioned in head (1) supra; or (3) any provision of the destination arrangement corresponding to any of those provisions, applies to a court exercising its powers under the Insolvency Act 1986 s 339 or s 340: s 342F(5) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71). For the meaning of 'the destination arrangement' see para 671 post.

3 For these purposes, 'transferor', in relation to a pension sharing transaction, means the person to whose rights the transaction relates: Insolvency Act 1986 s 342D(9) (as added: see note 1 supra).

4 For these purposes, 'transferee', in relation to a pension sharing transaction, means the person for whose benefit the transaction is made: ibid s 342D(9) (as added: see note 1 supra).

5 For these purposes, 'appropriate amount', in relation to a pension sharing transaction, means the appropriate amount in relation to that transaction for the purposes of the Welfare Reform and Pensions Act 1999 s 29(1) (creation of pension credits and debits: see SOCIAL SECURITY AND PENSIONS): Insolvency Act 1986 s 342D(9) (as added: see note 1 supra).

6 Ibid s 342D(1) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

7 Ie for the purposes of the Insolvency Act 1986 ss 340-342: see para 653 et seq ante.

8 Ibid s 342D(2) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

9 Ie under the Insolvency Act 1986 s 339 or s 340.

10 Ibid s 342D(3) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

11 For these purposes, 'shared arrangement', in relation to a pension sharing transaction, means the pension arrangement to which the transaction relates: Insolvency Act 1986 s 342D(9) (as added: see note 1 supra).

12 Ibid s 342D(4) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

13 Insolvency Act 1986 s 342D(5) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

14 Insolvency Act 1986 s 342D(6) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

15 Insolvency Act 1986 s 342D(7) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

16 Ie under the Insolvency Act 1986 s 342D(5) (as added): see supra.

17 Ibid s 342D(8) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

18 For these purposes, references to the person responsible for a pension arrangement are to: (1) the trustees or managers or provider of the arrangement; or (2) the person having functions in relation to the arrangement corresponding to those of a trustee, manager or provider: Insolvency Act 1986 s 342F(8) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 342F (as added) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 28.

19 Insolvency Act 1986 s 342F(1) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

20 Insolvency Act 1986 s 342F(2) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

21 For these purposes, 'intermediate arrangement' means a pension arrangement, other than the shared arrangement or the destination arrangement, in relation to which the following conditions are fulfilled: (1) there was a time when the transferee had rights under the arrangement that were derived, directly or indirectly, from the pension sharing transaction; and (2) the transferee's rights under the destination arrangement, so far as derived from the pension sharing transaction, are to any extent derived, directly or indirectly, from the rights mentioned in head (1) supra: Insolvency Act 1986 s 342F(4) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

22 Insolvency Act 1986 s 342F(3) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

23 Ie pursuant to the Insolvency Act 1986 s 342F(1)-(3) (as added): see supra.

24 Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 10(1)(c)(ii). For the date on which the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, came into force see para 395 note 3 ante.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/C. RECOVERY OF EXCESSIVE PENSION CONTRIBUTIONS/(B) Pension Sharing Cases/671. Contents of orders.

# **671. Contents of orders.**

If the court is making an order on the ground that a transaction is a transaction at an undervalue or a preference<sup>1</sup> in a case where:

- 879 (1) the transaction or preference is, or is any part of, a pension sharing transaction<sup>2</sup>; and
- 880 (2) the transferee<sup>3</sup> has rights under a pension arrangement ('the destination arrangement', which may be the shared arrangement<sup>4</sup> or any other pension arrangement) that are derived, directly or indirectly, from the pension sharing transaction,

the following provisions apply<sup>5</sup>.

The order may<sup>6</sup> include provision:

- 881 (a) requiring the person responsible for the destination arrangement<sup>7</sup> to pay an amount to the transferor's<sup>8</sup> trustee in bankruptcy;
- 882 (b) adjusting the liabilities of the destination arrangement<sup>9</sup> in respect of the transferee;
- 883 (c) adjusting any liabilities of the destination arrangement in respect of any other person that derive, directly or indirectly, from rights of the transferee under the destination arrangement;
- 884 (d) for the recovery by the person responsible for the destination arrangement, whether by deduction from any amount which that person is ordered to pay or otherwise, of costs incurred by that person in complying in the transferor's case with any specified requirement<sup>10</sup> or in giving effect to the order;
- 885 (e) for the recovery, from the transferor's trustee in bankruptcy, by the person responsible for a pension arrangement, of costs incurred by that person in complying in the transferor's case with any specified requirement<sup>11</sup>.

The maximum amount which the person responsible for the destination arrangement may be required to pay by the order is the smallest of:

- 886 (i) so much of the appropriate amount as is<sup>12</sup> recoverable;
- 887 (ii) so much, if any, of the amount of the unfair contributions<sup>13</sup> as is not recoverable by way of an order<sup>14</sup> containing a specified provision<sup>15</sup>;
- 888 (iii) the value of the transferee's rights under the destination arrangement so far as they are derived, directly or indirectly, from the pension sharing transaction<sup>16</sup>.

If the order requires the person responsible for the destination arrangement to pay an amount ('the restoration amount') to the transferor's trustee in bankruptcy, it must provide for the liabilities of the arrangement to be correspondingly reduced<sup>17</sup>.

The order is binding on the person responsible for the destination arrangement and overrides provisions of the destination arrangement to the extent that they conflict with the provisions of the order<sup>18</sup>.

1 le under the Insolvency Act 1986 s 339 or s 340: see para 653 et seq ante.

2 For the meaning of 'pension-sharing transaction' see para 670 note 1 ante.

3 For the meaning of 'transferee', in relation to a pension-sharing transaction, see para 670 note 4 ante.

4 For the meaning of 'shared arrangement' see para 670 note 11 ante.

5 Insolvency Act 1986 s 342E(1) (added by the Welfare Reform and Pensions Act 1999 s 84(1), Sch 12 paras 70, 71). For the date on which the Welfare Reform and Pensions Act 1999 s 84(1), so far as relating to Sch 12 paras 70, 71, and Sch 12 paras 70, 71 came into force see para 670 note 1 ante.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 342E (as added) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 28.

6 Ie without prejudice to the generality of *ibid* s 339(2) (see para 655 ante) or s 340(2) (see para 657 ante).

7 For the meaning of references to the person responsible for a pension arrangement see para 670 note 18 ante.

8 For the meaning of 'transferor', in relation to a pension-sharing transaction, see para 670 note 3 ante.

9 For these purposes, references to adjusting the liabilities of the destination arrangement in respect of a person include, in particular, reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement: Insolvency Act 1986 s 342E(3) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

10 Ie any requirement under the Insolvency Act 1986 s 342F(1) (as added): see para 670 ante.

11 *Ibid* s 342E(2) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71). The requirements so specified are requirements under the Insolvency Act 1986 s 343F(2) or (3) (see para 670 ante): s 342E(2) (as so added).

12 Ie in accordance with *ibid* s 342D (as added): see para 670 ante.

13 Ie within the meaning given by *ibid* s 342D(5) (as added): see para 670 ante.

14 Ie an order under *ibid* s 342A (as added and substituted): see para 668 ante.

15 Ie a provision such as is mentioned in *ibid* s 342B(1)(a) (as added and substituted): see para 669 head (1) ante.

16 *Ibid* s 342E(4) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71). Regulations may, for the purposes of the Insolvency Act 1986 ss 339-342 (see para 653 et seq ante) and ss 342D-s 324F (as added), make provision about the calculation and verification of any such value as is mentioned in s 342E(4)(c) (as so added) (see text head (iii) supra): s 342F(6)(a) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71). The power conferred by the Insolvency Act 1986 s 342F(6) (as so added) includes power to provide for calculation and verification: (1) in such manner as may, in the particular case, be approved by a prescribed person; or (2) in accordance with guidance from time to time prepared by a prescribed person and approved by the Secretary of State: s 342F(7) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71). For these purposes, 'prescribed' means prescribed by regulations; and 'regulations' means regulations made by the Secretary of State: Insolvency Act 1986 s 342F(9) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71). Such regulations may make different provision for different cases and may contain such incidental, supplemental and transitional provisions as appear to the Secretary of State necessary or expedient; and they must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Insolvency Act 1986 s 342F(10), (11) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71). In exercise of the power so conferred the Secretary of State made the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 9 (see *infra*) which came into force on 6 April 2002: reg 1(1).

Accordingly, where the Insolvency Act 1986 s 342E (as added) applies, the value of a transferee's rights under a destination arrangement, derived directly or indirectly from a pension-sharing transaction is: (a) the cash equivalent of those rights at the date on which the trustee in bankruptcy's request for that valuation is received by the responsible person; and (b) calculated and verified in accordance with the following provisions: Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 9(1). In calculating and verifying the cash equivalent of the transferee's rights referred to in reg 9(1), the Pension Sharing (Pension Credit Benefit) Regulations 2000, SI 2000/1054, reg 24 (amended by SI 2000/2691) (see SOCIAL SECURITY AND PENSIONS) has effect for these purposes in like manner to that in which it has effect for the calculation and verification of pension credit for the purposes of the Pension Sharing (Pension Credit Benefit)



Regulations 2000, SI 2000/1054 (as amended): Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836, reg 9(2).

As to the application of the Insolvency Act 1986 s 342F (as added) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 670 note 18 ante.

17 Ibid s 342E(5) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71). For these purposes, liabilities are correspondingly reduced if the difference between: (1) the amount of the liabilities immediately before the reduction; and (2) the amount of the liabilities immediately after the reduction, is equal to the restoration amount: Insolvency Act 1986 s 342E(6) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71). Regulations may make provision about the calculation and verification of any such amounts as are mentioned in the Insolvency Act 1986 s 342E(6)(a), (b) (as so added) (see heads (1), (2) supra): s 342F(6)(b) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71). At the date at which this volume states the law no such regulations had been made. See also note 16 supra.

18 Insolvency Act 1986 s 342E(7) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 70, 71).

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **671 Contents of orders**

NOTE 16--1986 Act s 342F(7) amended: Pensions Act 2007 Sch 5 para 4.

SI 2000/1054 reg 24 substituted: SI 2008/1050.

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## ***D. EXTORTIONATE CREDIT TRANSACTIONS***

### **672. In general.**

Where a person is adjudged bankrupt and he is or has been a party to a transaction for, or involving, the provision to him of credit, the following provisions apply<sup>1</sup>.

1 Insolvency Act 1986 s 343(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 343 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

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Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/D. EXTORTIONATE CREDIT TRANSACTIONS/673. Extortionate credit transaction.

### **673. Extortionate credit transaction.**

A transaction is extortionate if, having regard to the risk accepted by the person providing the credit:

- 889 (1) the terms of it are or were such as to require grossly exorbitant payments to be made, whether unconditionally or in certain contingencies, in respect of the provision of the credit<sup>1</sup>; or
- 890 (2) it otherwise grossly contravened ordinary principles of fair dealing;

and it is to be presumed, unless the contrary is proved, that a transaction with respect to which an application is made<sup>2</sup> is or, as the case may be, was extortionate<sup>3</sup>.

1 For cases considering the acceptability of particular rates of interest for the provision of credit in particular circumstances see CONSUMER CREDIT. References to decisions under the Consumer Credit Act 1974 ss 137-139 (as amended) must be made subject to the following facts: (1) that the definition of 'extortionate' in s 138 (see CONSUMER CREDIT vol 9(1) (Reissue) para 269) is rather more specific than the definition in the Insolvency Act 1986 s 343(3), albeit that the additional matters specified in the Consumer Credit Act 1974 s 138 would appear to be matters which a court would not ordinarily ignore when considering whether any particular credit transaction was extortionate; and (2) neither the trustee nor the bankrupt, while undischarged, may make an application under s 139(1)(a) (see CONSUMER CREDIT vol 9(1) (Reissue) para 270) to reopen an extortionate credit transaction: see the Insolvency Act 1986 s 343(6); and para 675 post. Under both s 343(3) and the Consumer Credit Act 1974 (see s 171(7); and CONSUMER CREDIT), the burden of proof lies on the creditor to show that a credit transaction is not extortionate.

2 I.e. under the Insolvency Act 1986 s 343: see para 674 post. Cf the Consumer Credit Act 1974 s 139; and CONSUMER CREDIT vol 9(1) (Reissue) para 270.

3 Insolvency Act 1986 s 343(3). As to the application of s 343 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 672 note 1 ante.

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **673 Extortionate credit transaction**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4,

Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/D. EXTORTIONATE CREDIT TRANSACTIONS/674. Orders with respect to extortionate credit transactions.

#### **674. Orders with respect to extortionate credit transactions.**

On the application of the trustee of the bankrupt's estate<sup>1</sup>, the court may make an order with respect to the transaction if the transaction is or was extortionate<sup>2</sup> and was not entered into more than three years before the commencement of the bankruptcy<sup>3</sup>.

An order with respect to any such transaction may contain such one or more of the following provisions as the court thinks fit, that is to say:

- 891 (1) provision setting aside the whole or part of any obligation created by the transaction;
- 892 (2) provision otherwise varying the terms of the transaction or varying the terms on which any security for the purposes of the transaction is held;
- 893 (3) provision requiring any person who is or was a party to the transaction to pay to the trustee any sums paid to that person, by virtue of the transaction, by the bankrupt;
- 894 (4) provision requiring any person to surrender to the trustee any property held by him as security for the purposes of the transaction; and
- 895 (5) provision directing accounts to be taken between any persons<sup>4</sup>.

Any sums or property to be paid or surrendered to the trustee in accordance with an order under the above provisions is to be comprised in the bankrupt's estate<sup>5</sup>.

1 As to the mode of application and the procedure see para 764 et seq post.

2 See para 673 ante.

3 Insolvency Act 1986 s 343(2). As to the commencement of bankruptcy see para 213 ante; and as to the application of s 343 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 672 note 1 ante.

4 Ibid s 343(4).

5 Ibid s 343(5).

#### **UPDATE**

#### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/D. EXTORTIONATE CREDIT TRANSACTIONS/675. Other remedies.

### **675. Other remedies.**

Neither the trustee of a bankrupt's estate nor an undischarged bankrupt is entitled to make an application under the provisions of the Consumer Credit Act 1974 relating to the reopening of extortionate credit agreements<sup>1</sup> for any agreement by which credit is or has been provided to the bankrupt to be reopened; but the powers conferred with respect to extortionate credit transactions<sup>2</sup> are exercisable in relation to any transaction concurrently with any powers exercisable in relation to that transaction as a transaction at an undervalue<sup>3</sup>.

1    le under the Consumer Credit Act 1974 s 139(1)(a): see CONSUMER CREDIT vol 9(1) (Reissue) para 270.

2    le the powers conferred by the Insolvency Act 1986 s 343: see para 674 ante.

3    Ibid s 343(6). As to transactions at an undervalue see para 653 et seq ante; and as to the application of s 343 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 672 note 1 ante.

### **UPDATE**

#### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **675 Other remedies**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTE 3--Insolvency Act 1986 s 343(6) repealed in part: Consumer Credit Act 2006 Sch 4.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/E. ASSIGNMENT OF BOOK DEBTS; CONTRACTS/676. Avoidance of general assignment of book debts.

### ***E. ASSIGNMENT OF BOOK DEBTS; CONTRACTS***

## 676. Avoidance of general assignment of book debts.

Where a person engaged in any business makes a general assignment<sup>1</sup> to another person of his existing or future book debts<sup>2</sup> or any class of them, and is subsequently adjudged bankrupt, the assignment is void against the trustee of the bankrupt's estate as regards book debts which were not paid before the presentation of the bankruptcy petition<sup>3</sup>, unless the assignment has been registered under the Bills of Sale Act 1878<sup>4</sup>. For purposes of registration under the 1878 Act, an assignment of book debts is to be treated as if it were a bill of sale given otherwise than by way of security for the payment of a sum of money; and the provisions of that Act with respect to the registration of bills of sale apply accordingly with such necessary modifications as may be made by rules under that Act<sup>5</sup>.

1 For these purposes, 'assignment' includes an assignment by way of security or charge on book debts, and 'general assignment' does not include: (1) an assignment of book debts due at the date of the assignment from specified debtors or of debts becoming due under specified contracts; or (2) an assignment of book debts included either in a transfer of a business made in good faith and for value or in an assignment of assets for the benefit of creditors generally: Insolvency Act 1986 s 344(3). Where a general equitable assignment of book debts was followed by specific legal assignments of some of the same debts, the latter were valid against the trustee: *Hill v Alex Lawrie Factors* [2000] BPIR 1038.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 344 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

2 I.e. debts which in the ordinary course of business would be entered in a well-kept trade book: *Shipley v Marshall* (1863) 14 CBNS 566; and see *Blakey v Pendlebury Property Trustees* [1931] 2 Ch 255, CA.

3 See para 124 et seq ante.

4 Insolvency Act 1986 s 344(1), (2). As to the Bills of Sale Act 1878 see further FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1620 et seq.

5 Insolvency Act 1986 s 344(4).

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## 677. Contracts to which bankrupt is a party.

Where a contract has been made with a person who is subsequently adjudged bankrupt, the court may, on the application of any other party to the contract, make an order discharging obligations under the contract on such terms as to payment by the applicant or the bankrupt of

damages for non-performance or otherwise as appear to the court to be equitable<sup>1</sup>. Any damages payable by the bankrupt by virtue of such an order of the court are provable as a bankruptcy debt<sup>2</sup>.

Where an undischarged bankrupt is a contractor in respect of any contract jointly with any person, that person may sue or be sued in respect of the contract without the joinder of the bankrupt<sup>3</sup>.

1 Insolvency Act 1986 s 345(1), (2). As to the application of s 345 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 434 note 4 ante.

Where a contract is unprofitable, from the estate's point of view, the trustee may elect either to adopt or disclaim it: see para 417 ante. If the trustee wishes to perform a contract, he must perform the bankrupt's part of the contract, as and when the bankrupt should have done so himself: *Gibson v Carruthers* (1841) 8 M & W 321 at 333. If the trustee does not perform his part of the contract within a reasonable time, the other party may treat the contract as abandoned: *Lawrence v Knowles* (1839) 5 Bing NC 399; *Morgan v Bain* (1874) LR 10 CP 15; *Re Nathan, ex p Stapleton* (1879) 10 ChD 586, CA. The provisions in the Insolvency Act 1986 s 345 enable a party to a contract, presumably one which is not onerous for the estate, to discharge obligations under the contract with suitable orders for compensation to either party in consequence of their discharge: see *Re Potters Oils Ltd (No 2)* [1986] 1 All ER 890, [1986] 1 WLR 201.

2 Insolvency Act 1986 s 345(3). As to proofs of debt see para 490 et seq ante.

3 Ibid s 345(4). Where one of two joint covenantors has become bankrupt, notice of assignment of the benefit of the contract need not be given to him: *Josselson v Borst, (Gliksten, third party)* [1938] 1 KB 723, [1937] 3 All ER 722, CA.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/F. EXECUTION/678. Rights of execution creditors.

## F. EXECUTION

### 678. Rights of execution creditors.

Subject to the statutory provisions imposing restrictions on proceedings and remedies<sup>1</sup>, and to the following provisions<sup>2</sup>, where the creditor of any person who is adjudged bankrupt has, before the commencement of the bankruptcy<sup>3</sup>:

- 896 (1) issued execution against goods or land of that person; or
- 897 (2) attached a debt due to that person from another person,

that creditor is not entitled, as against the official receiver or trustee of the bankrupt's estate, to retain the benefit of the execution or attachment, or any sums paid to avoid it, unless the

execution or attachment was completed<sup>4</sup>, or the sums were paid, before the commencement of the bankruptcy<sup>5</sup>.

Where<sup>6</sup>:

- 898 (a) under an execution in respect of a judgment for a sum exceeding such sum as may be prescribed for these purposes<sup>7</sup>, the goods of any person are sold or money is paid in order to avoid a sale; and
- 899 (b) before the end of the period of 14 days beginning with the day of the sale or payment the sheriff or other officer charged with the execution is given notice that a bankruptcy petition has been presented in relation to that person; and
- 900 (c) a bankruptcy order is or has been made on that petition,

the balance of the proceeds of sale or money paid, after deducting the costs of the execution, are, in priority to the claim of the execution creditor, comprised in the bankrupt's estate<sup>8</sup>.

1    Ie the Insolvency Act 1986 s 285: see para 218 ante.

2    See infra; and para 679 post.

3    As to the commencement of bankruptcy see para 213 ante.

4    For these purposes: (1) an execution against goods is completed by seizure and sale or by the making of a charging order under the Charging Orders Act 1979 s 1 (amended by the Administration of Justice Act 1982 ss 34(3), 37, Sch 3 Pt II paras 2, 3, 6; the County Courts Act 1984 s 148(1), Sch 2 Pt V) (see CIVIL PROCEDURE vol 12 (2009) PARA 1467 et seq); (2) an execution against land is completed by seizure, by the appointment of a receiver or by the making of a charging order under the Charging Orders Act 1979 s 1 (as so amended); (3) an attachment of a debt is completed by the receipt of the debt: Insolvency Act 1986 s 346(5). See further paras 683-685 post. The onus of proving that he completed his execution before the date of the bankruptcy order lies on the execution creditor: *Re Matanlè, ex p Schulte* (1874) 9 Ch App 409; *Re Joy, ex p Cartwright* (1881) 44 LT 883, CA. As to the application of the rule that a judicial act was made in the final moment of the day when it was done see *Re Palmer (a debtor)* [1994] Ch 316, [1994] 3 All ER 835, CA.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 346 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5    Insolvency Act 1986 s 346(1). The rights conferred by s 346(1)-(3) on the official receiver or the trustee may, to such extent and on such terms as it thinks fit, be set aside by the court in favour of the creditor who has issued the execution or attached the debt: s 346(6). See further para 681 post.

6    Ie subject to *ibid* s 346(6): see note 5 *supra*.

7    For these purposes, the sum so prescribed is £500: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 3, Schedule Pt II. As to the Secretary of State's power to prescribe monetary limits see para 22 ante.

8    Insolvency Act 1986 s 346(3). Neither s 346(2) (see para 679 post) nor s 346(3) applies in relation to any execution against property which has been acquired by or has devolved on the bankrupt since the commencement of the bankruptcy, unless, at the time the execution is issued or before it is completed: (1) the property has been or is claimed for the bankrupt's estate under s 307 (see para 445 ante); and (2) a copy of the notice given under s 307 has been or is served on the sheriff or other officer charged with the execution: s 346(8).

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **678 Rights of execution creditors**

TEXT AND NOTES--Insolvency Act 1986 s 346 amended: Courts Act 2003 Sch 8 para 297.

NOTE 7--The amount is now £1,000: SI 1986/1996 Schedule Pt II (substituted by SI 2004/547). SI 1986/1996 art 3 amended: SI 2009/465.

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## **679. Duties of sheriff.**

Where any goods of a person have been taken in execution, then, if before the completion of the execution<sup>1</sup> notice is given to the sheriff or other officer charged with the execution that that person has been adjudged bankrupt:

- 901 (1) the sheriff or other officer must on request deliver to the official receiver or trustee of the bankrupt's estate the goods and any money seized or recovered in part satisfaction of the execution; but
- 902 (2) the costs of the execution are a first charge on the goods or money so delivered and the official receiver or trustee may sell the goods or a sufficient part of them for the purpose of satisfying the charge<sup>2</sup>.

Accordingly, in the case of an execution in respect of a judgment for a sum exceeding the prescribed sum<sup>3</sup>, the sheriff or other officer charged with the execution may not dispose of the balance of the proceeds of any sale of goods sold under an execution or money paid to avoid a sale after deduction of the costs of execution<sup>4</sup> within the period of 14 days beginning with the day of the sale or payment<sup>4</sup> or while there is pending a bankruptcy petition of which he has been given notice, and must pay that balance, where it is so comprised in the bankrupt's estate, to the official receiver or, if there is one, to the trustee of that estate<sup>5</sup>.

1 As to completion of an execution against goods see para 683 post.

2 Insolvency Act 1986 s 346(2). Section 346(2) is subject to s 346(8) (see para 678 note 8 ante): s 346(2). As to the application of s 346 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 678 note 4 ante.

The rights conferred by s 346(1)-(3) on the official receiver or the trustee may, to such extent and on such terms as it thinks fit, be set aside by the court in favour of the creditor who has issued the execution or attached the debt: s 346(6). See further para 681 post.

3 Ie the sum prescribed for the purposes of *ibid* s 346(3): see para 678 note 7 ante.

4 Ie mentioned in *ibid* s 346(3): see para 678 ante.

5 *Ibid* s 346(4).

## **UPDATE**



## **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **679 Duties of sheriff**

TEXT AND NOTES--Insolvency Act 1986 s 346 amended: Courts Act 2003 Sch 8 para 297.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/F. EXECUTION/680. Detailed assessment of sheriff's costs.

### **680. Detailed assessment of sheriff's costs.**

Where a sheriff is required to deliver up goods or money<sup>1</sup>, or has deducted costs from the proceeds of sale of an execution or money paid to him<sup>2</sup>, the responsible insolvency practitioner<sup>3</sup> may require in writing that the sheriff's bill of costs be decided by detailed assessment<sup>4</sup>. Where such a requirement is made, the sheriff must deliver his bill within three months of the requirement being made, or within such further time as the court, on application, may grant; and, if the sheriff fails to comply with this provision, the insolvency practitioner may deal with the insolvent estate<sup>5</sup> without regard to any claim by the sheriff, whose claim is forfeited<sup>6</sup>.

Where, in the case of a deduction of costs from the proceeds of an execution or money paid to him, any amount is disallowed at the conclusion of the detailed assessment proceedings, the sheriff must forthwith pay a sum equal to that amount to the insolvency practitioner for the benefit of the insolvent estate<sup>7</sup>.

1    Ie under the Insolvency Act 1986 s 346(2): see para 679 ante.

2    Ie under ibid s 346(3): see para 678 ante.

3    For the meaning of 'responsible insolvency practitioner' see para 21 note 6 ante.

4    Insolvency Rules 1986, SI 1986/1925, r 7.36(1) (substituted by SI 1999/1022). As to the general provisions relating to detailed assessment see the Insolvency Rules 1986, SI 1986/1925, rr 7.33-7.42 (as amended); and para 805 et seq post.

5    For the meaning of 'the insolvent estate' see para 91 note 18 ante.

6    Insolvency Rules 1986, SI 1986/1925, rr 7.35(4), 7.36(2).

7    Ibid r 7.36(3) (substituted by SI 1999/1022).

## **UPDATE**

## **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **680 Detailed assessment of [enforcement officer's] costs**

TEXT AND NOTES 1-6--References to a sheriff are replaced with references to an enforcement officer, or other officer, charged with execution of the writ or other process: see SI 1986/1925 r 7.36 (amended by SI 2005/527).

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## **681. Powers of the court.**

The rights conferred<sup>1</sup> on the official receiver or the trustee in respect of the benefit of executions or attachments which have not been completed before the commencement of the bankruptcy may, to such extent and on such terms as it thinks fit, be set aside by the court in favour of the creditor who has issued the execution or attached the debt<sup>2</sup>.

1 le by the Insolvency Act 1986 s 346(1)-(3): see paras 678, 679 ante.

2 Ibid s 346(6). As to the application of s 346 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 678 note 4 ante.

The discretionary powers of the court under s 346(6) are extremely wide and of an undefined character. Under the corresponding provisions in ss 183, 184 (formerly the Companies Act 1985 ss 621, 622 (repealed)), the following principles have emerged: (1) it is intended that all creditors, including prima facie all execution creditors who have not 'completed' their execution, should rank *pari passu* in the distribution of the debtor's assets; (2) an execution creditor who is able to prove that he was unfairly, though not necessarily fraudulently, obstructed in putting in train, or bringing to a conclusion, a process of execution, may qualify for favourable consideration by way of exception to the general rule; (3) in general, however, such a creditor will have to show an extremely strong case before the court will intervene: *Re Grosvenor Metal Co Ltd* [1950] Ch 63, [1949] 2 All ER 948; *Re Suidair International Airways Ltd* [1951] Ch 165, [1950] 2 All ER 920; *Re Rainbow Tours Ltd* [1964] Ch 66, [1963] 2 All ER 820; *Re Redman (Builders) Ltd* [1964] 1 All ER 851, [1964] 1 WLR 541; *Re Caribbean Products (Yam Importers) Ltd*, *Tickler v Swains Packaging Ltd* [1966] Ch 331, [1966] 1 All ER 181, CA; *Re Aro Co Ltd* [1980] Ch 196, [1980] 1 All ER 1067, CA; *Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation)* [1983] 2 AC 192, [1983] 1 All ER 564, HL; *Re Buckingham International plc (in liquidation) (No 2)*, *Mitchell v Buckingham International plc (in liquidation)* [1998] 2 BCLC 369, [1998] BCC 943, CA. See further COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 882 et seq.

## **UPDATE**

## **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **681 Powers of the court**

NOTE 2--See *Tagore Investments SA v Official Receiver* [2008] EWHC 3495 (Ch), [2009] BPIR 392, [2009] All ER (D) 63 (Jan) (appropriate degree of unfairness established therefore right for court to exercise its discretion).

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## **682. Rights of third parties.**

Nothing in the above provisions<sup>1</sup> entitles the trustee of a bankrupt's estate to claim goods from a person who has acquired them in good faith under a sale from a sheriff or other officer charged with an execution<sup>2</sup>.

<sup>1</sup> I.e. in the Insolvency Act 1986 s 346: see paras 678-681 ante.

<sup>2</sup> Ibid s 346(7). As to the application of s 346 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 678 note 4 ante.

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## **683. Completion of execution against goods.**

An execution against goods is completed by seizure and sale<sup>1</sup>. An execution is incomplete if the sheriff has been induced by payment on account or otherwise to withdraw temporarily, and will, it seems, be incomplete, even though the sheriff withdraws permanently, as where, on payment of part of the debt in order to avoid a sale, he so withdraws with the execution creditor's assent<sup>2</sup>. Thus, an execution is not completed by the judgment debtor paying the debt to the judgment creditor<sup>3</sup>. If the sale, for whatever reason, is not a sale under the execution, the execution is not completed<sup>4</sup>. Where an execution creditor causes goods to be seized by the sheriff, who, however, is ordered to withdraw in favour of a receiver, the execution is not completed<sup>5</sup>.

An execution against goods is also completed by the making of a charging order<sup>6</sup> under the Charging Orders Act 1979<sup>7</sup>. The charging order must be absolute and the bankruptcy of the debtor is a sufficient cause for the court not to convert an order nisi into an order absolute<sup>8</sup>.

1 Insolvency Act 1986 s 346(5)(a). As to the application of s 346 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 678 note 4 ante. The words 'seizure and sale' are to be strictly construed: *Re Andrew, ex p Official Receiver* [1937] Ch 122 at 134, [1936] 3 All ER 450 at 463, CA; *Re Caribbean Products (Yam Importers) Ltd, Tickler v Swains Packaging Ltd* [1966] Ch 331, [1966] 1 All ER 181, CA.

2 *Re Fairley* [1922] 2 Ch 791 at 801. See also *Re Gooding, ex p Trustee* [1914] 2 KB 70; *Re Evans, ex p Salaman* [1916] HBR 111.

3 *Re Pollock and Pendle, ex p Wilson and Mathieson Ltd* (1902) 87 LT 238.

4 *Heathcote v Livesley* (1887) 19 QBD 285 at 287 per Wills J.

5 *Mackay v Merritt* (1886) 34 WR 433.

6 See under the Charging Orders Act 1979 s 1 (amended by the Administration of Justice Act 1982 ss 34(3), 37, Sch 3 Pt II paras 2, 3, 6; the County Courts Act 1984 s 148(1), Sch 2 Pt V): see CIVIL PROCEDURE vol 12 (2009) PARA 1467 et seq.

7 Insolvency Act 1986 s 346(5)(a).

8 *Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation)* [1983] 2 AC 192, [1983] 1 All ER 564, HL (company case).

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/F. EXECUTION/684. Completion of execution against land.

### 684. Completion of execution against land.

An execution against land is completed by seizure<sup>1</sup>, by the appointment of a receiver or by the making of a charging order<sup>2</sup> under the Charging Orders Act 1979<sup>3</sup>. An execution by the appointment of a receiver is complete on the making of a final order of appointment by the court<sup>4</sup>, notwithstanding that he has not given any security and perfected his appointment<sup>5</sup>. An execution by the making of a charging order is complete on the making of the order absolute<sup>6</sup>.

1 As to completing execution and obtaining possession of land see CIVIL PROCEDURE vol 12 (2009) PARA 1309.

2 See under the Charging Orders Act 1979 s 1 (amended by the Administration of Justice Act 1982 ss 34(3), 37, Sch 3 Pt II paras 2, 3, 6; the County Courts Act 1984 s 148(1), Sch 2 Pt V): see CIVIL PROCEDURE vol 12 (2009) PARA 1467 et seq.

3 Insolvency Act 1986 s 346(5)(b). As to the application of s 346 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 678 note 4 ante.

4 *Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation)* [1983] 2 AC 192 at 213, [1983] 1 All ER 564 at 576, HL (company case).

5 *Re Watkins, ex p Evans* (1879) 13 ChD 252, CA (decided when the relevant statutory provision specified that execution was completed by the appointment of a receiver 'in the case of an equitable interest' in land). Cf *Re Pearce, ex p Official Receiver, Trustee* [1919] 1 KB 354, CA. See also *Re Overseas Aviation Engineering (GB) Ltd* [1963] Ch 24, [1962] 3 All ER 12, CA; *Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation)* [1983] 2 AC 192, [1983] 1 All ER 564, HL.

6 *Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation)* [1983] 2 AC 192, [1983] 1 All ER 564, HL.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

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#### 685. Attachment of debts.

An attachment of a debt<sup>1</sup> is completed by actual receipt<sup>2</sup> of the debt by the judgment creditor<sup>3</sup>. Where a judgment creditor has obtained a charging order on the judgment debtor's interest in a partnership<sup>4</sup>, and the partners have paid money into court to redeem the judgment debtor's interest and avoid the charging order, there is not a completed execution<sup>5</sup>. Moreover, where the execution takes the form of a writ of sequestration to compel the debtor to pay money into court, and execution has not been completed by a sale before the bankruptcy order, or if, before the bankruptcy order, the money received under the sequestration has merely been paid to the sequestrator's account in court, the execution has not been completed, and the execution creditor is not protected<sup>6</sup>.

Execution is completed neither by an order nisi charging securities<sup>7</sup> nor by an order obtained without notice being given to any other party appointing a receiver of a debtor's interest in a residuary estate<sup>8</sup>.

As in the case of an execution<sup>9</sup>, an attachment, to be protected, must be completed and not merely partly carried out. Where, therefore, a judgment creditor attaches a debt, but agrees not to enforce the attachment against the garnishee before a certain date, and before this date a bankruptcy order is made against the judgment debtor, the creditor cannot maintain his claim to the debt, and the garnishee must pay it to the trustee in bankruptcy<sup>10</sup>.

1 The attachment by garnishee proceedings under CPR Sch 1, RSC Ord 49 or under the Crown Proceedings Act 1947 s 27(1) (amended by the Supreme Court Act 1981 ss 152(4), 153(4), (5), Sch 7): see CIVIL PROCEDURE vol 12 (2009) PARA 1428.

2 For this purpose, 'receipt' means actual receipt; constructive receipt is not sufficient: *Butler v Wearing* (1885) 17 QBD 182; *Re Trehearne, ex p Ealing Local Board* (1890) 60 LJQB 50, CA; *Re Bagley* [1911] 1 KB 317, CA; *Galbraith v Grimshaw* [1910] AC 508 at 511, HL. See also *George v Thompson's Trustee* [1949] Ch 322, [1949] 1 All ER 554 (where the fact that the creditor had not actually received payment before the receiving order was made was due solely to administrative delay in the court office, but it was held that the attachment was not complete); applied in *Re Lupkovics, ex p Trustee v Freville* [1954] 2 All ER 125, [1954] 1 WLR 1234 (payment by the Crown to the creditor's solicitors did not, in the circumstances, constitute receipt by the creditor).

3 Insolvency Act 1986 s 346(5)(c). As to the application of s 346 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 678 note 4 ante.

4 Ie under the Partnership Act 1890 s 23(2) (amended by the Courts Act 1971 s 56(4), Sch 11 Pt II): see PARTNERSHIP vol 79 (2008) PARAS 95-97.

5 *Wild v Southwood* [1897] 1 QB 317.

6 *Re Pollard, ex p Pollard* [1903] 2 KB 41, CA; *Re Hastings, ex p Brown* (1892) 61 LJQB 654 at 659; cf *Re Hoare, ex p Nelson* (1880) 14 ChD 41, CA.

7 Ie an order to show cause under CPR Sch 1, RSC Ord 50 r 1: *Re Hutchinson, ex p Hutchinson* (1885) 16 QBD 515. See also execution.

8 *Re Potts, ex p Taylor* [1893] 1 QB 648, CA; and see *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192, [1983] 1 All ER 564, HL.

9 See para 683 ante.

10 *Re Trehearne, ex p Ealing Local Board* (1890) 60 LJQB 50, CA; *George v Thompson's Trustee* [1949] Ch 322, [1949] 1 All ER 554.

## UPDATE

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### 685 Attachment of debts

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/G. DISTRESS/686. Distress.

## G. DISTRESS

### 686. Distress.

The right of any landlord or other person to whom rent is payable to distrain<sup>1</sup> on the goods and effects of an undischarged bankrupt for rent due to him from the bankrupt is available, subject to the provisions mentioned below<sup>2</sup>, against goods and effects comprised in the bankrupt's estate<sup>3</sup>. Where the distress is levied after the commencement of the bankruptcy<sup>4</sup>, the amount of rent accrued due prior to the date of the bankruptcy order for which distress may be levied is limited to six months' rent<sup>5</sup>. As regards rent due after the date of the bankruptcy order, there is no such limitation<sup>6</sup>. Any right to distrain against property comprised in a bankrupt's estate is exercisable notwithstanding that the property has vested in the trustee<sup>7</sup>; and the above provisions are without prejudice to a landlord's right in a bankruptcy to prove for any bankruptcy debt in respect of rent<sup>8</sup>.

A landlord's right of distress is lost if he permits the goods to leave the premises<sup>9</sup>. The landlord is not a secured creditor, although he has a preferential right of distress if there are goods on which he can distrain; and, therefore, if he does not distrain, or if at the date when the right of distress arises, no goods available for distress remain on the premises, his only remedy is to prove for his rent<sup>10</sup>.

Where a landlord or other person to whom rent is payable has distrained for rent on the goods and effects of an individual to whom a bankruptcy petition relates and a bankruptcy order is subsequently made on that petition, any amount recovered by way of that distress which:

903 (1) is in excess of the amount which would have been recoverable after the commencement of the bankruptcy; or

904 (2) is in respect of rent for a period or part of a period after the distress was levied,

must be held for the bankrupt as part of his estate<sup>11</sup>.

1 As to distress for rent generally see DISTRESS vol 13 (2007 Reissue) para 905 et seq. As to the landlord's right of re-entry see *Cadogan Estates Ltd v McMahon* [2001] 1 AC 378, [2000] 4 All ER 897, HL.

2 I.e. the Insolvency Act 1986 s 347(5): see para 691 post.

3 Ibid s 347(1). Nothing in Pts VIII-XI (ss 252-385) (as amended) affects any right to distrain otherwise than for rent; and any such right is at any time exercisable without restriction against the property comprised in a bankrupt's estate, even if that right is expressed by any enactment to be exercisable in like manner as a right to distrain for rent: s 347(8).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 347 applies: Administration of Insolvent Estates of Deceased Persons Order 1986. SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

As from such day as the Secretary of State may by order made by statutory instrument appoint:

74 (1) in the Insolvency Act 1986 s 347(1) after the words '(subject to' there are to be inserted the words 'sections 252(2)(b) and 254(1) above and' (Insolvency Act 2000 ss 3, 16(1), (3), Sch 3 paras 1, 14(a));

75 (2) in the Insolvency Act 1986 s 347(8) at the beginning there are to be inserted the words 'Subject to sections 252(2)(b) and 254(1) above' (Insolvency Act 2000 Sch 3 paras 1, 14(b)).

At the date at which this volume states the law no such day had been appointed.

4 As to the commencement of bankruptcy see para 213 ante.

5 Insolvency Act 1986 s 347(1).

6 *Re Binns, ex p Hale* (1875) 1 ChD 285; *Re Wells* [1929] 2 Ch 269. As to restrictions on the period for which distress may be levied in the case of an agricultural holding see AGRICULTURAL LAND vol 1 (2008) PARAS 346-348.

7 Insolvency Act 1986 s 347(9).

8 Ibid s 347(10).

9 *Re Mackenzie, ex p Sheriff of Hertfordshire* [1899] 2 QB 566 at 573, CA. See also *Ex p Deschermes* (1742) 1 Atk 103; *Ex p Plummer* (1739) 1 Atk 103.

10 *Thomas v Patent Lionite Co* (1881) 17 ChD 250, CA. Only rent due to the date of the bankruptcy order is a bankruptcy debt for which the landlord may prove. Where, however, the trustee disclaims a lease, and the landlord sustains loss or damage in consequence of the operation of such disclaimer, he is deemed to be a creditor of the bankrupt to the extent of the loss or damage and accordingly may prove for the loss or damage as a bankruptcy debt: see the Insolvency Act 1986 s 315(5); and para 488 ante.

11 Ibid s 347(2). To avoid distress, the official receiver often undertakes to pay the landlord the rent for which he is entitled to distrain, out of the proceeds of the distrainable goods when sold; this undertaking will bind the official receiver and the trustee: see *Re Chapman, ex p Goodyear* (1894) 10 TLR 449.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

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### 686 Distress

TEXT AND NOTES--Insolvency Act 1986 s 347 amended: Courts Act 2003 Sch 8 para 298.

NOTE 3--Day now appointed: SI 2002/2711.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/G. DISTRESS/687. Restrictions on right of distress.

### 687. Restrictions on right of distress.

It appears that a landlord may pursue his claim for rent both by distress and proof until a dividend is declared, after which time he must elect between the two remedies<sup>1</sup>. A landlord who has proved in the bankruptcy of one of two joint tenants may distrain on the goods of the other for the same arrears of rent<sup>2</sup>. The landlord's statutory right of distress<sup>3</sup> is affected neither by the making of the bankruptcy order<sup>4</sup> nor by the fact that the goods have been seized and sold by the sheriff, if they still remain on the premises<sup>5</sup>.

Where a bankruptcy occurs during a quarter, the landlord may distrain at the end of the quarter for the whole quarter's rent, or for a proportionate part of it accrued due prior to the bankruptcy order<sup>6</sup>. If rent is payable half-yearly, and a bankruptcy order is made against the tenant before the end of the last half-year, the landlord cannot, in respect of rent accrued due prior to the bankruptcy order, obtain by distress levied before the end of the half-year more than six months of the overdue rent<sup>7</sup>.

The limitation of the landlord's right is only for the benefit of the creditors, and does not extend to goods not belonging to the bankrupt<sup>8</sup>; but a mortgagee whose goods have been seized and sold may claim to stand in the place of the landlord against other goods of the bankrupt liable to a distress<sup>9</sup>.

If a landlord neglects to distrain for his rent, he may be postponed to a solicitor who obtains a charging order in respect of his costs on property recovered or preserved by him<sup>10</sup>.

1 See the Insolvency Act 1986 s 347(10); para 686 ante; and *Holmes v Watt* [1935] 2 KB 300, CA. Cf *Ex p Grove* (1747) 1 Atk 104.

2 *Holmes v Watt* [1935] 2 KB 300, CA. It is not clear whether a landlord who proves and receives a dividend in respect of his claim for rent against a bankrupt joint tenant may also distrain on the goods of the other solvent joint tenant; but it is submitted that, as both joint tenants are liable for the full amount of the rent, the landlord may pursue whatever remedies are available to him against each of them, so long as he does not receive more than 100 pence in the pound on his claim.



3 See para 686 ante.

4 *Re Howell, ex p Mandleberg & Co* [1895] 1 QB 844, DC. See also *Re Mayhew, ex p Till* (1873) LR 16 Eq 97.

5 *Re Davies, ex p Pollen's Trustees* (1885) 3 Morr 27.

6 See the Insolvency Act 1986 s 347(1); para 686 ante; *Re Howell, ex p Mandleberg & Co* [1895] 1 QB 844, DC; *Bishop of Rochester v Le Fanu* [1906] 2 Ch 513; *Re Solomon, ex p Dressler* (1878) 9 ChD 252, CA; *Re Leeks* [1902] 2 IR 339.

7 See the judgment of Vaughan Williams J in *Re Wilson, ex p Lord Hastings* (1893) 10 Morr 219 at 226 et seq.

8 *Brocklehurst v Lawe* (1857) 7 E & B 176; *Railton v Wood* (1890) 15 App Cas 363, PC. Cf *Re Collins* (1888) 21 LR Ir 508. Goods of undertenants and lodgers are, however, protected by the Law of Distress Amendment Act 1908: see DISTRESS vol 13 (2007 Reissue) para 950 et seq.

9 *Re Stephenson, ex p Stephenson* (1847) De G 586. A person who, at the creditor's request, pays out a distress, after and even with notice of the bankruptcy, may be entitled to claim recoupment out of the estate before the creditors receive a dividend: *Re Humphreys, ex p Kennard* (1870) 21 LT 684; *Re Ayshford, ex p Lovering* (1887) 4 Morr 164. See also *Re Craig & Sons, ex p Hinchcliffe* [1916] 2 KB 497.

10 *Re Suffield and Watts, ex p Brown* (1888) 20 QBD 693, CA.

## UPDATE

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### 688. Landlord's rights against execution creditor.

Where in the case of any execution:

- 905 (1) a landlord is entitled under the Landlord and Tenant Act 1709<sup>1</sup> or the County Courts Act 1984<sup>2</sup> to claim for an amount not exceeding one year's rent; and
- 906 (2) the person against whom the execution is levied is adjudged bankrupt before the notice of claim is served on the sheriff or other officer charged with the execution,

the right of the landlord so to claim is restricted to a right to claim for an amount not exceeding six months' rent and does not extend to any rent payable in respect of a period after the notice of claim is so served<sup>3</sup>.

Nothing in the above provisions imposes any liability on a sheriff or other officer charged with an execution to account to the official receiver or the trustee of a bankrupt's estate for any sums paid by him to a landlord at any time before the sheriff or other officer was served with notice of the bankruptcy order in question<sup>4</sup>.

- 1 le under the Landlord and Tenant Act 1709 s 1: see DISTRESS.
- 2 le under the County Courts Act 1984 s 102 (amended by the Insolvency Act 1986 s 439(2), Sch 14): see DISTRESS vol 13 (2007 Reissue) para 1041.
- 3 Insolvency Act 1986 s 347(6). As to the application of s 347 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 686 note 3 ante.
- 4 Ibid s 347(7). Section 347(7) is without prejudice to the liability of the landlord: s 347(7).

## UPDATE

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### 688 Landlord's rights against execution creditor

TEXT AND NOTES--Insolvency Act 1986 s 347 amended: Courts Act 2003 Sch 8 para 298.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(ii) Adjustment of prior and other Transactions/G. DISTRESS/689. Landlord's claim against sheriff.

### 689. Landlord's claim against sheriff.

Where the sheriff has seized and sold goods of a debtor in pursuance of a writ of execution in respect of a judgment for a sum exceeding £500, and during the 14 days for which he is obliged to hold the proceeds he receives notice of a bankruptcy order made against the debtor, the claim of the official receiver or trustee to the proceeds of sale<sup>1</sup> will be postponed to the landlord's claim against the sheriff for rent<sup>2</sup>.

Under this provision the landlord may claim from the sheriff only rent which accrued due at the time of the taking of the goods in execution, not that which accrued afterwards<sup>3</sup>.

- 1 le under the Insolvency Act 1986 s 346(3): see para 678 ante.
- 2 *Re Mackenzie, ex p Sheriff of Hertfordshire* [1899] 2 QB 566, CA. It appears that the same rule will apply where the goods seized under an execution have not been sold, but remain in the sheriff's hands, and the official receiver makes a claim under the Insolvency Act 1986 s 346(2) (cited in para 679 ante): see *Re Mackenzie, ex p Sheriff of Hertfordshire* supra at 576. The money which has to be paid to the trustee in bankruptcy is the proceeds of the execution proper, which can only be ascertained after the execution creditor has paid the landlord the amount payable in respect of rent under the Landlord and Tenant Act 1709 (see DISTRESS), and the money so paid has been repaid out of the proceeds of the sale to the execution creditor: *Re Craig & Sons, ex p Hinchcliffe* [1916] 2 KB 497. Should the sheriff pay over to the trustee in bankruptcy the proceeds of sale without deducting what he has paid to the landlord, the court will make the trustee do what is right and order him to repay the amount to the execution creditor: *Re Craig & Sons, ex p Hinchcliffe* supra. See also *Re Driver, ex p Sheriff of Lancashire* (1899) 43 Sol Jo 705, CA (where the sheriff sold for the official receiver).

In short, the express provisions of the Landlord and Tenant Act 1709 in favour of the landlord are not interfered with by the Insolvency Act 1986, except to the extent provided by s 347(6) (see para 688 ante). The Landlord

and Tenant Act 1709 s 1 does not apply to executions in the county court, which, where there is a claim by the landlord, are regulated by the County Courts Act 1984 s 102 (amended by the Insolvency Act 1986 s 439(2), Sch 14): see CIVIL PROCEDURE vol 12 (2009) PARA 1353.

3 *Re Davis, ex p Pollen's Trustees* (1885) 3 Morr 27.

## UPDATE

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### **690. Charge for preferential debts.**

Where any person, whether or not a landlord or person entitled to rent, has distrained on the goods or effects of an individual who is adjudged bankrupt before the end of the period of three months beginning with the distraint, so much of those goods or effects, or of the proceeds of their sale, as is not held for the bankrupt<sup>1</sup> is charged for the benefit of the bankrupt's estate with the preferential debts<sup>2</sup> of the bankrupt to the extent that the bankrupt's estate is for the time being insufficient for meeting those debts<sup>3</sup>.

Where, by virtue of any such charge, any person surrenders any goods or effects to the trustee of a bankrupt's estate or makes a payment to such a trustee, that person ranks, in respect of the amount of the proceeds of sale of those goods or effects by the trustee or, as the case may be, the amount of the payment, as a preferential creditor of the bankrupt, except as against so much of the bankrupt's estate as is available for the payment of preferential creditors by virtue of the surrender or payment<sup>4</sup>.

1 *Ie* under the Insolvency Act 1986 s 347(2): see para 686 ante.

2 As to preferential debts see para 577 et seq ante.

3 Insolvency Act 1986 s 347(3). As to the application of s 347 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 686 note 3 ante.

4 *Ibid* s 347(4).

## UPDATE

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### **691. No distress after discharge.**

A landlord or other person to whom rent is payable is not at any time after the discharge of a bankrupt<sup>1</sup> entitled to distrain on any goods or effects comprised in the bankrupt's estate<sup>2</sup>.

1 As to discharge from bankruptcy see para 629 et seq ante.

2 Insolvency Act 1986 s 347(5). As to the application of s 347 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 686 note 3 ante.

### **UPDATE**

#### **647-706 Effect of bankruptcy on certain rights, transactions etc**

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### **692. Agreements regarding distress.**

Where a landlord has agreed to accept a reduced rent if paid punctually and there is a default, his right to distrain for the original rent in the bankruptcy will revive<sup>1</sup>.

By agreeing with the tenant after the commencement of his bankruptcy not to distrain, but to take over the goods at a valuation, the landlord cannot become entitled to retain more than six months' rent as against the trustee<sup>2</sup>.

1 *Re Smith and Hartogs, ex p Official Receiver* (1895) 2 Mans 400.

2 *Re Griffith, ex p Official Receiver* (1897) 4 Mans 217, DC; but see *Re Wilson, ex p Lord Hastings* (1893) 10 Morr 219 (where in special circumstances the landlord was allowed to retain more than six months' rent as against the value of growing crops and other things taken over at a valuation). As to the commencement of bankruptcy see para 213 ante.

### **UPDATE**

#### **647-706 Effect of bankruptcy on certain rights, transactions etc**

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### **693. Persons possessing right of distress.**

The persons to whom the above provisions give priority by way of a right to distrain<sup>1</sup> include not only landlords in the ordinary sense of the term, but also any person who stands in a position analogous to that of a landlord in relation to a person by whom that which is called rent is payable<sup>2</sup>.

Thus, a mortgagee to whom the mortgagor has attorned tenant would, where the attornment clause is valid, have a right of distress for rent payable under that clause; but, in effect, owing to certain statutory provisions<sup>3</sup>, the exercise of the right of distress by a mortgagee has become practically obsolete<sup>4</sup>.

It is no objection that the rent varies from time to time, for example, the arrears payable under a building society's mortgage<sup>5</sup>; or that the mortgagor has already attorned tenant to a prior mortgagee<sup>6</sup>.

<sup>1</sup> See paras 686-690 ante.

<sup>2</sup> See the Insolvency Act 1986 s 347(1); and *Re Roberts, ex p Hill* (1877) 6 ChD 63, CA.

<sup>3</sup> See the Bills of Sale Act 1878 s 6: see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1652. Where the attornment clause in a mortgage deed is not affected by the Bills of Sale Act 1878, its validity will depend on whether there was a real tenancy at a real and fair rent, or whether it was a sham tenancy and the transaction a device to give the mortgagee, in case of bankruptcy, a security over chattels which belong to the creditors generally. Cf *Re Thompson, ex p Williams* (1877) 7 ChD 138, CA (where the mortgage debt was £55,000, and the mortgagor attorned tenant at the rent of £20,000 a year, about seven times the letting value of the premises) and *Re Bowes, ex p Jackson* (1880) 14 ChD 725, CA (where the mortgage debt was £7,090 and the rent £8,000), with *Re Stockton Iron Furnace Co* (1879) 10 ChD 335, CA; *Re Knight, ex p Voisey* (1882) 21 ChD 442, CA (where the rent fluctuated in amount). There may be an attornment to more than one mortgagee: *Re Kitchin, ex p Punnett* (1880) 16 ChD 226, CA. An attornment clause will not deprive the mortgagee of his right as a mortgagee to fixtures affixed to the premises after the mortgage: *Re Kitchin, ex p Punnett* supra.

The proceeds of a distress under such a clause may be applied to payment of principal as well as interest, even though the yearly rent is equal in amount to the interest on the debt: *Re Betts, ex p Harrison* (1881) 18 ChD 127, CA.

Where the parties agreed that a tenancy from year to year should be created, but that the mortgagee should have a right to determine it at any time, it was not thereby made a tenancy at will so as to be determined by liquidation proceedings on the part of the mortgagor under the Bankruptcy Act 1869 s 125 (repealed): *Re Threlfall, ex p Queen's Benefit Building Society* (1880) 16 ChD 274, CA; and see MORTGAGE vol 77 (2010) PARA 343.

<sup>4</sup> *Re Willis, ex p Kennedy* (1888) 21 QBD 384, CA.

<sup>5</sup> *Re Knight, ex p Voisey* (1882) 21 ChD 442, CA.

<sup>6</sup> *Re Kitchin, ex p Punnett* (1880) 16 ChD 226, CA.

### **UPDATE**

## **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **694. Distraint otherwise than for rent.**

Nothing in the Insolvency Act 1986<sup>1</sup> affects any right to distrain otherwise than for rent; and any such right is at any time exercisable without restriction against property comprised in the bankrupt's estate, even if that right is expressed by any enactment to be exercisable in like manner as a right to distrain for rent<sup>2</sup>.

1     le the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

2     Ibid s 347(8). As to the application of s 347 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 686 note 3 ante; and as to the prospective amendment of s 347(8) see para 686 note 3 ante.

## **UPDATE**

## **647-706 Effect of bankruptcy on certain rights, transactions etc**

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## **H. APPRENTICESHIPS**

### **695. Apprenticeships; articulated clerks.**

Where a bankruptcy order is made in respect of an individual<sup>1</sup> to whom another individual was an apprentice or articulated clerk at the time when the petition on which the order was made was presented<sup>2</sup>, and the bankrupt or the apprentice or clerk gives notice to the trustee terminating the apprenticeship or articles, then, subject to the provisions mentioned below<sup>3</sup>, the indenture of apprenticeship or, as the case may be, the articles of agreement are discharged with effect from the commencement of the bankruptcy<sup>4</sup>.

If any money has been paid by or on behalf of the apprentice or clerk to the bankrupt as a fee, the trustee may, on an application made by or on behalf of the apprentice or clerk, pay such sum to the apprentice or clerk as the trustee thinks reasonable, having regard to:

- 907 (1) the amount of the fee;
- 908 (2) the proportion of the period in respect of which the fee was paid that has been served by the apprentice or clerk before the commencement of the bankruptcy; and
- 909 (3) the other circumstances of the case<sup>5</sup>.

The power of the trustee so to make a payment has priority over his obligation to distribute the bankrupt's estate<sup>6</sup>; but, instead of making such a payment, the trustee may, if it appears to him expedient to do so on an application made by or on behalf of the apprentice or clerk, transfer the indenture or articles to a person other than the bankrupt<sup>7</sup>. Where a transfer is so made, the above provisions<sup>8</sup> regarding the effective date of discharge have effect only as between the apprentice or clerk and the bankrupt<sup>9</sup>.

If, on an application made to him in writing by an employee, the Secretary of State is satisfied that the employer of that employee has become insolvent, the employee's employment has been terminated and on the appropriate date the employee was entitled to be paid the whole or part of any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by the apprentice or articulated clerk, the Secretary of State must pay the employee out of the National Insurance Fund<sup>10</sup> the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of that fee or premium<sup>11</sup>.

1 See para 195 et seq ante. It appears to be sufficient if the bankrupt has been paid the fee, and the agreement has been made, even though it has not been embodied in an indenture or articles: *Re Donkin, ex p Haynes* (1826) 2 Gl & J 122.

2 See para 124 et seq ante.

3 Ie subject to the Insolvency Act 1986 s 348(6): see text to note 9 infra.

4 Ibid s 348(1), (2). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 348 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 Insolvency Act 1986 s 348(3).

6 See para 573 et seq ante.

7 Insolvency Act 1986 s 348(4), (5).

8 Ie ibid s 348(2): see supra.

9 Ibid s 348(6).

10 As to the National Insurance Fund see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 8.

11 See the Employment Rights Act 1996 ss 182, 184(1)(e); and EMPLOYMENT vol 39 (2009) PARA 557.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

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## **I. LIENS ON BOOKS**

### **696. Unenforceability of liens on books etc.**

A lien or other right to retain possession of any books, papers or other records of a bankrupt is unenforceable to the extent that its enforcement would deny possession of any books, papers or other records to the official receiver or the trustee of the bankrupt's estate<sup>1</sup>; but this provision does not apply to a lien on documents which give a title to property and are held as such<sup>2</sup>.

<sup>1</sup> Insolvency Act 1986 s 349(1). A trustee in bankruptcy will be entitled to overreach a solicitor's lien over the papers and records of the bankrupt: *Re Aveling Barford Ltd* [1988] 3 All ER 1019, [1989] 1 WLR 360.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 349 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

<sup>2</sup> Insolvency Act 1986 s 349(2). For the meaning of 'documents which give a title to property and are held as such' see *Re SEIL Trade Finance Ltd* [1992] BCC 538.

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

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## **(iii) Disqualification of and Prohibitions on Bankrupt**

### **A. DISQUALIFICATION FROM OFFICE**

#### **697. Parliamentary disqualification.**

Where a court in England and Wales or Northern Ireland adjudges an individual bankrupt or a court in Scotland awards sequestration of an individual's estate, the individual is disqualified:

910 (1) for sitting or voting in the House of Lords;



- 911 (2) for being elected to, or sitting or voting in, the House of Commons; and
- 912 (3) for sitting or voting in a committee of either House<sup>1</sup>.

Where an individual is so disqualified, the disqualification ceases:

- 913 (a) except where the adjudication is annulled<sup>2</sup> or the award recalled or reduced without the individual having been first discharged, on the discharge<sup>3</sup> of the individual; and
- 914 (b) in the excepted case, on the annulment, recall or reduction, as the case may be<sup>4</sup>.

No writ of summons may be issued to any lord of Parliament who is for the time being disqualified under the above provisions for sitting and voting in the House of Lords<sup>5</sup>.

Where a member of the House of Commons who is disqualified under the above provisions continues to be so disqualified until the end of the period of six months beginning with the day of the adjudication or award, his seat must be vacated at the end of that period<sup>6</sup>.

A court which makes such an adjudication or award in relation to any lord of Parliament or member of the House of Commons must forthwith certify the adjudication or award to the Speaker of the House of Lords<sup>7</sup> or, as the case may be, the Speaker of the House of Commons<sup>8</sup>; and, where a court has so certified, then, immediately after it becomes apparent which of the following certificates is applicable, the court must certify to the Speaker of the House of Commons:

- 915 (i) that the period of six months beginning with the day of the adjudication or award has expired without the adjudication or award having been annulled, recalled or reduced; or
- 916 (ii) that the adjudication or award has been annulled, recalled or reduced before the end of that period<sup>9</sup>.

Subject to the above provisions, so much of the Insolvency Act 1986 and any other enactment, whenever passed, and of any subordinate legislation, whenever made, as makes provision for or in connection with bankruptcy in one or more parts of the United Kingdom, applies in relation to persons having privilege of Parliament or peerage<sup>10</sup> as it applies in relation to persons not having such privilege<sup>11</sup>.

No parliamentary election and no return to Parliament may be questioned except by a petition complaining of an undue election or undue return<sup>12</sup>.

1 Insolvency Act 1986 s 427(1). Section 427(1), as applied to a member of the Northern Ireland Assembly by virtue of the Northern Ireland Act 1998 s 36(4), has effect as if 'or Northern Ireland' were omitted: Insolvency Act 1986 s 427(6C) (added by the Northern Ireland Act 1998 s 99, Sch 13 para 6).

2 As to the annulment of bankruptcy orders see para 610 et seq ante.

3 As to discharge from bankruptcy see para 629 et seq ante.

4 Insolvency Act 1986 s 427(2).

5 Ibid s 427(3).

6 Ibid s 427(4). Section 427(4) and s 427(5), (6) (see infra) have effect in relation to a member of the Scottish Parliament as if: (1) references to the House of Commons were to the Parliament and references to the Speaker were to the Presiding Officer; and (2) in s 427(4), for 'under this section' there were substituted 'under section 15(1)(b) of the Scotland Act 1998 by virtue of this section': Insolvency Act 1986 s 427(6A) (added by the Scotland Act 1998 s 125(1), Sch 8 para 23(1), (6)).

The Insolvency Act 1986 s 427(4) and s 427(5), (6) (see *infra*) have effect in relation to a member of the National Assembly for Wales as if: (a) references to the House of Commons were to the Assembly; and (b) in s 427(4), for 'under this section' there were substituted 'under section 12(2) of the Government of Wales Act 1998 by virtue of this section': Insolvency Act 1986 s 427(6B) (added by the Government of Wales Act 1998 s 125, Sch 12 para 24).

The Insolvency Act 1986 s 427(4) and s 427(5), (6) (see *infra*) have effect in relation to a member of the Northern Ireland Assembly as if: (i) references to the House of Commons were to the Assembly and references to the Speaker were to the Presiding Officer; and (ii) in s 427(4), for 'under this section' there were substituted 'under section 36(4) of the Northern Ireland Act 1998 by virtue of this section': Insolvency Act 1986 s 427(6C) (as added: see note 1 *supra*).

7 The Lord Chancellor or the Lord Keeper of the Great Seal for the time being is *ex officio* Speaker of the House of Lords: see *PARLIAMENT* vol 78 (2010) PARA 850.

8 As to the Speaker of the House of Commons see *PARLIAMENT* vol 78 (2010) PARA 850 *et seq.*

9 Insolvency Act 1986 s 427(5), (6). See also note 6 *supra*.

10 As to these privileges see *PARLIAMENT* vol 78 (2010) PARA 1076 *et seq.*

11 Insolvency Act 1986 s 427(7)(a). Subject to s 427(1)-(6), so much of the Insolvency Act 1986 and any other enactment, whenever passed, and of any subordinate legislation, whenever made, as makes provision conferring a power of arrest in connection with the winding up or insolvency of companies in one or more parts of the United Kingdom, applies in relation to persons having privilege of Parliament or peerage as it applies in relation to persons not having such privilege: s 427(7)(b). As to the power of arrest in connection with the winding up or insolvency of companies see further *COMPANY AND PARTNERSHIP INSOLVENCY* vol 7(3) (2004 Reissue) para 543.

12 See the Representation of the People Act 1983 s 120(1); and *ELECTIONS AND REFERENDUMS* vol 15(4) (2007 Reissue) para 759.

## UPDATE

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

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### **697-699 Disqualification from Office**

The Enterprise Act 2002 s 268 empowers the Secretary of State or the National Assembly for Wales to review legislation relating to the disqualification of bankrupts: see PARA 699A.

### **697 Parliamentary disqualification**

TEXT AND NOTE 1--Words 'England and Wales or' omitted: Insolvency Act 1986 s 427(1) (amended by the Enterprise Act 2002 s 266(2)(a)). As to the disqualification of bankrupts from Parliament, the Scottish Parliament, the Northern Ireland Assembly or the National Assembly for Wales, where the bankruptcy occurs in England and Wales, see PARA 697A. The Secretary of State may by order (1) provide for the 1986 Act s 426A or 426B (see PARA 697A) to have effect in relation to orders made or undertakings accepted in Scotland or Northern Ireland under a system which appears to the Secretary of State to be equivalent to the system operating under Sch 4A (see PARA 646A); (2) make consequential amendment of s 426A or 426B; (3) make other consequential amendment of an enactment: 2002 Act s 266(3). An order under s 266 may make transitional, consequential or incidental provision (s 266(4)), must be made

by statutory instrument, and may not be made unless a draft has been laid before and approved by resolution of each House of Parliament (s 266(5)).

NOTE 6--Now head (b) in s 427(4), for 'under this section' there were substituted 'under section 16(2) of the Government of Wales Act 2006 by virtue of this section': Insolvency Act 1986 s 427(6B) (added by the Government of Wales Act 1998 s 125, Sch 12 para 24; amended by the Government of Wales Act 2006 Sch 10 para 18).

TEXT AND NOTE 11--1986 Act s 427(7) repealed: 2002 Act s 266(2)(b).

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### **697A. Disqualification from Parliament.**

A person in respect of whom a bankruptcy restrictions order or a debt relief restrictions order<sup>1</sup> has effect is disqualified (1) from membership of the House of Commons<sup>2</sup>; (2) from sitting or voting in the House of Lords<sup>3</sup>; and (3) from sitting or voting in a committee of the House of Lords or a joint committee of both Houses<sup>4</sup>.

If a member of the House of Commons becomes so disqualified, his seat must be vacated<sup>5</sup>, and if a person who is so disqualified is returned as a member of the House of Commons, his return is void<sup>6</sup>. No writ of summons may be issued to a member of the House of Lords who is so disqualified<sup>7</sup>.

If a court makes a bankruptcy restrictions order or interim order, or a debt relief restrictions order or an interim debt relief restrictions order,<sup>8</sup> in respect of a member of the House of Commons or the House of Lords the court must notify the Speaker<sup>9</sup> of that House<sup>10</sup>. If the Secretary of State accepts a bankruptcy restrictions undertaking or a debt relief restrictions undertaking<sup>11</sup> made by a member of the House of Commons or the House of Lords, the Secretary of State must notify the Speaker of that House<sup>12</sup>.

An enactment<sup>13</sup> about insolvency applies in relation to a member of the House of Commons or the House of Lords irrespective of any Parliamentary privilege<sup>14</sup>.

1 As to bankruptcy restrictions orders, which apply in England and Wales, see PARA 646A.1. As to debt relief restrictions orders, see PARA 123B.

2 Insolvency Act 1986 s 426A(1)(a) (ss 426A-426C added by the Enterprise Act 2002 s 264; Insolvency Act 1986 ss 426A, 426B amended by Tribunals, Courts and Enforcement Act 2007 Sch 20 paras 12, 13).

3 1986 Act s 426A(1)(b).

4 Ibid s 426A(1)(c).

5 Ibid s 426A(2).

6 Ibid s 426A(3).

7 Ibid s 426A(4).

8 As to interim bankruptcy restrictions orders, which apply in England and Wales, see PARA 646A.2. As to debt relief restrictions orders and interim debt relief restrictions orders, see PARA 123B.

9 As to the Speakers of the House of Commons and the House of Lords see PARLIAMENT vol 78 (2010) PARAS 850 et seq, 931 et seq.

10 1986 Act s 426A(5). Also, if a court makes a bankruptcy restrictions order or interim order in respect of a member of the Scottish Parliament, the Northern Ireland Assembly or the National Assembly for Wales, or makes a debt relief restrictions order or interim debt relief restrictions order in respect of such a member, the court must notify the presiding officer of that body: s 426B(1). As to the Scottish Parliament see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 51-66; as to the National Assembly for Wales see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 42A et seq; as to the Northern Ireland Assembly see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 70.

11 As to bankruptcy restrictions undertakings, which apply in England and Wales, see PARA 646A.3. As to debt relief restrictions undertakings, see PARA 123B.

12 1986 Act s 426A(6). Also, if the Secretary of State accepts a bankruptcy restrictions undertaking or a debt relief restrictions undertaking made by a member of the Scottish Parliament, the Northern Ireland Assembly or the National Assembly for Wales, the Secretary of State must notify the presiding officer of that body: s 426B(2).

13 'Enactment' includes a provision made by or under an Act of the Scottish Parliament, or Northern Ireland legislation: *ibid* s 426C(2).

14 *Ibid* s 426C(1). As to these privileges see PARLIAMENT vol 78 (2010) PARA 1076 et seq.

## UPDATE

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

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### **697-699 Disqualification from Office**

The Enterprise Act 2002 s 268 empowers the Secretary of State or the National Assembly for Wales to review legislation relating to the disqualification of bankrupts: see PARA 699A.

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### **698. Local government disqualification.**

A person is disqualified for being elected or being a member of a local authority if he is a person who has been adjudged bankrupt, or made a composition or arrangement with his creditors<sup>1</sup>. Where a person is so disqualified by reason of having been adjudged bankrupt, the disqualification ceases, unless the bankruptcy order made against that person is previously annulled, on his discharge from bankruptcy; and, if the bankruptcy order is so annulled, on the date of the annulment<sup>2</sup>.

A person who is adjudged bankrupt is disqualified for being elected to or holding the office of Lord Mayor, alderman or common councilman of the City of London<sup>3</sup>; and such disqualification ceases on his discharge from bankruptcy or, if the bankruptcy order is previously annulled, on the date of its annulment<sup>4</sup>. Where a person is adjudged bankrupt while holding any of those offices, his office immediately becomes vacant<sup>5</sup>.

A person is disqualified for being elected or being the Mayor or a member of the London Assembly if he is a person who has been adjudged bankrupt, or made a composition or arrangement with his creditors<sup>6</sup>. Where a person is so disqualified by reason of having been adjudged bankrupt, the disqualification ceases, unless the bankruptcy order made against that person is previously annulled, on his discharge from bankruptcy; and, if the bankruptcy order is so annulled, on the date of the annulment<sup>7</sup>.

An election may be questioned on the ground that the person whose election is questioned was, at the time of the election, disqualified; and may not be so questioned except by an election petition<sup>8</sup>. The continuance in office of a disqualified person may be challenged by proceedings for judicial review for an order restraining such person from acting and a declaration that the office is vacant<sup>9</sup>.

1 See the Local Government Act 1972 s 80(1)(b); and LOCAL GOVERNMENT vol 69 (2009) PARA 119.

2 See *ibid* s 81(1)(b) (substituted by the Insolvency Act 1985 s 235(1), Sch 8 para 22); and LOCAL GOVERNMENT vol 69 (2009) PARA 119. As to annulment of bankruptcy orders see para 610 *et seq* ante; and as to discharge from bankruptcy see para 629 *et seq* ante.

3 City of London Municipal Elections Act 1849 s 8B(1) (added by the Statute Law (Repeals) Act 1989 s 1(2), Sch 2 para 1).

4 City of London Municipal Elections Act 1849 s 8B(2) (added by the Statute Law (Repeals) Act 1989 Sch 2 para 1).

5 City of London Municipal Elections Act 1849 s 8B(3) (added by the Statute Law (Repeals) Act 1989 Sch 2 para 1).

6 See the Greater London Authority Act 1999 s 21(1)(c); and LONDON GOVERNMENT vol 29(2) (Reissue) para 86.

7 See *ibid* s 21(3); and LONDON GOVERNMENT vol 29(2) (Reissue) para 86.

8 See the Representation of the People Act 1983 s 127; and ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) para 760.

9 *le* under CPR Pt 54; see JUDICIAL REVIEW vol 61 (2010) PARA 662; CIVIL PROCEDURE vol 12 (2009) PARA 1530. As to judicial review generally see JUDICIAL REVIEW vol 61 (2010) PARA 601 *et seq*.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

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### 697-699 Disqualification from Office

The Enterprise Act 2002 s 268 empowers the Secretary of State or the National Assembly for Wales to review legislation relating to the disqualification of bankrupts: see PARA 699A.

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on Bankrupt/A. DISQUALIFICATION FROM OFFICE/699. Other disqualifications of undischarged bankrupt.

**699. Other disqualifications of undischarged bankrupt.**

A person adjudged bankrupt is disqualified for:

- 917 (1) being appointed or acting as a justice of the peace<sup>1</sup>;
- 918 (2) engaging in estate agency work of any description except as an employee of another person<sup>2</sup>;
- 919 (3) being appointed as superintendent registrar or registrar of births and deaths or registrar of marriages<sup>3</sup>;
- 920 (4) being a charity trustee<sup>4</sup>;
- 921 (5) being a member of the Central Police Training and Development Authority<sup>5</sup>;

and provision is made concerning the duration and removal of the above disqualifications<sup>6</sup>.

A bankrupt may not be appointed as an attorney under an enduring power of attorney<sup>7</sup>.

- 1 See the Justices of the Peace Act 1997 s 65(1); and MAGISTRATES vol 29(2) (Reissue) para 512.
- 2 See the Estate Agents Act 1979 s 23(1); and AGENCY vol 1 (2008) PARA 244.
- 3 See the Registration of Births, Deaths and Marriages Regulations 1968, SI 1968/2049, reg 5(a)(i); and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 613.
- 4 See the Charities Act 1993 s 72(1)(b); and CHARITIES vol 8 (2010) PARA 273.
- 5 See the Criminal Justice and Police Act 2001 s 87(2), Sch 3 para 3(1); and POLICE vol 36(1) (2007 Reissue) para 243.
- 6 See the Justices of the Peace Act 1997 s 65(2) and MAGISTRATES vol 29(2) (2002 Reissue) para 512; the Estate Agents Act 1979 s 23(2) (amended by the Insolvency Act 1985 Sch 8 para 33) and AGENCY vol 1 (2008) PARA 244; the Registration of Births, Deaths and Marriages Regulations 1968, SI 1968/2049, reg 5(a)(i) and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 613; the Charities Act 1993 s 72(3), (4) and CHARITIES vol 8 (2010) PARA 273; and the Criminal Justice and Police Act 2001 Sch 3 para 3(2) and POLICE.
- 7 See the Enduring Powers of Attorney Act 1985 s 2(7)(a); and AGENCY vol 1 (2008) PARA 196.

**UPDATE**

**647-706 Effect of bankruptcy on certain rights, transactions etc**

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**697-699 Disqualification from Office**

The Enterprise Act 2002 s 268 empowers the Secretary of State or the National Assembly for Wales to review legislation relating to the disqualification of bankrupts: see PARA 699A.

**699 Other disqualifications of undischarged bankrupt**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTE 5--Central Police Training and Development Authority abolished; 2001 Act s 87(2), Sch 3 para 3(1) repealed: Police and Justice Act 2006 Sch 15 Pt 1(A).

NOTE 6--Justices of the Peace Act 1997 s 65 repealed: Enterprise Act 2002 s 265.

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### **699A. Review of disqualification provisions.**

The Secretary of State<sup>1</sup> may make an order<sup>2</sup> in relation to a disqualification provision<sup>3</sup>. A 'disqualification provision' is a provision<sup>4</sup> which disqualifies, whether permanently or temporarily and whether absolutely or conditionally<sup>5</sup>, a bankrupt<sup>6</sup> or a class of bankrupts from being elected or appointed to an office or position, holding an office or position, or becoming or remaining a member of a body<sup>7</sup> or group<sup>8</sup>.

An order<sup>9</sup> may repeal or revoke the disqualification provision<sup>10</sup>. An order<sup>11</sup> may amend, or modify the effect of, the disqualification provision (1) so as to reduce the class of bankrupts to whom the disqualification provision applies<sup>12</sup>; (2) so as to extend the disqualification provision to some or all individuals who are subject to a bankruptcy restrictions regime<sup>13</sup>; (3) so that the disqualification provision applies only to some or all individuals who are subject to a bankruptcy restrictions regime<sup>14</sup>; (4) so as to make the application of the disqualification provision wholly or partly subject to the discretion of a specified person, body or group<sup>15</sup>.

An order by virtue head (4) may provide for a discretion to be subject to (a) the approval of a specified person or body<sup>16</sup>; (b) appeal to a specified person or body<sup>17</sup>. An order by virtue of head (4) may provide for a discretion to be subject to appeal to a specified court or tribunal; but any such order must if it relates to England and Wales, be made with the concurrence of the Lord Chief Justice of England and Wales<sup>18</sup>.

1 A reference to the Secretary of State is to be treated as a reference to the National Assembly for Wales in so far as it relates to a disqualification provision which is made by the Assembly, or relates to a function of the Assembly: Enterprise Act 2002 s 268(14).

2 An order under *ibid* s 268 may make provision generally or for a specified purpose only, may make different provision for different purposes, and may make transitional, consequential or incidental provision: s 268(12). Such an order must be made by statutory instrument, and may not be made unless a draft has been laid before and approved by resolution of each House of Parliament: s 268(13). See the Enterprise Act 2002 (Disqualification from Office: General) Order 2006, SI 2006/1722.

3 2002 Act s 268(1).

4 'Provision' means a provision made by an Act of Parliament passed before or in the same session as the 2002 Act, and a provision made, before or in the same session as the 2002 Act, under an Act of Parliament: s 268(11).

5 The reference to a provision which disqualifies a person conditionally includes a reference to a provision which enables him to be dismissed: *ibid* s 268(3).

6 'Bankrupt' means an individual (1) who has been adjudged bankrupt by a court in England and Wales or in Northern Ireland; (2) whose estate has been sequestrated by a court in Scotland; or (3) who has made an agreement with creditors of his for a composition of debts, for a scheme of arrangement of affairs, for the grant of a trust deed or for some other kind of settlement or arrangement: s 268(9).

7 'Body' includes Parliament and any other legislative body: ibid s 268(11).

8 Ibid s 268(2).

9 Ie an order under ibid s 268(1).

10 Ibid s 268(4).

11 Ie an order under ibid s 268(1).

12 Ibid s 268(5)(a).

13 Ibid s 268(5)(b). 'Bankruptcy restrictions regime' means an order or undertaking (1) under the Insolvency Act 1986 Sch 4A (see PARA 646A); or (2) under any system operating in Scotland or Northern Ireland which appears to the Secretary of State to be equivalent to the system operating under Sch 4A: 2002 Act s 268(10).

14 Ibid s 268(5)(c).

15 Ibid s 268(5)(d).

16 Ibid s 268(6)(a).

17 Ibid s 268(6)(b). The Secretary of State may specify himself for the purposes of head (4) or head (a) or (b): s 268(8).

18 Ibid s 268(7) (amended by Constitutional Reform Act 2005 Sch 4 para 305(2)). Provision made by virtue of the 2002 Act s 268(7) is subject to any order of the Lord Chancellor under the Access to Justice Act 1999 s 56(1) (see CIVIL PROCEDURE vol 12 (2009) PARA 1658): 2002 Act s 268(15). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the 2002 Act s 268(7): s 268(16) (added by 2005 Act Sch 4 para 305(3)).

## UPDATE

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **697-699 Disqualification from Office**

The Enterprise Act 2002 s 268 empowers the Secretary of State or the National Assembly for Wales to review legislation relating to the disqualification of bankrupts: see PARA 699A.

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### **700. Bankruptcy of solicitors.**



An adjudication in bankruptcy of a solicitor operates immediately to suspend any practising certificate of that solicitor for the time being in force<sup>1</sup>. Where a solicitor applies for a practising certificate while he is an undischarged bankrupt or after having been adjudged bankrupt and discharged or after having entered into a composition with his creditors or a deed of arrangement for the benefit of his creditors, the Law Society may in its discretion grant or refuse the application, or decide to issue a certificate to the applicant subject to such conditions as the Society may think fit<sup>2</sup>.

Where a bankruptcy order is made against a solicitor, or such an order is rescinded or annulled, the court must forthwith give notice to the Secretary of the Law Society of the order that it has made<sup>3</sup>.

1 See the Solicitors Act 1974 s 15(1); and LEGAL PROFESSIONS vol 66 (2009) PARA 901. The suspension of a practising certificate by reason of an adjudication in bankruptcy terminates if the adjudication is annulled and an office copy of the order annulling the adjudication is served on the Law Society: see s 16(2); and LEGAL PROFESSIONS vol 66 (2009) PARA 901. As to annulment of bankruptcy orders see para 610 et seq ante. As to the bankruptcy of solicitors generally see *The Guide to the Professional Conduct of Solicitors* (8th Edn, 1999) para 3.15, Annex 3H.

2 See the Solicitors Act 1974 s 12(1)(h), (i), (3), (4) (amended by the Insolvency Act 1985 s 235, Sch 8 para 25, Sch 10 Pt III); and LEGAL PROFESSIONS vol 66 (2009) PARA 898. As to appeals see the Solicitors Act 1974 s 13 (amended by the Administration of Justice Act 1985 s 8, Sch 1 para 5); and LEGAL PROFESSIONS vol 66 (2009) PARA 900.

3 Insolvency Rules 1986, SI 1986/1925, r 6.235. Where proceedings in bankruptcy have been taken against any solicitor, the Law Society is entitled to inspect the file of those proceedings without payment of any fee, and to be supplied with office copies of those proceedings on payment of the usual charge: see the Solicitors Act 1974 s 83; and LEGAL PROFESSIONS vol 65 (2008) PARA 625.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 700 Bankruptcy of solicitors

NOTE 1--*Guide to the Professional Conduct of Solicitors* (8th Edn, 1999) replaced, with effect from 1 July 2007, by the *Solicitors' Code of Conduct 2007*.

TEXT AND NOTE 3--SI 1986/1925 r 6.235 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(iii) Disqualification of and Prohibitions on Bankrupt/B. PROHIBITIONS ON BANKRUPT/701. Prohibition on acting as an insolvency practitioner.

## **B. PROHIBITIONS ON BANKRUPT**

### **701. Prohibition on acting as an insolvency practitioner.**

A person is not qualified to act as an insolvency practitioner if at that time he has been adjudged bankrupt or sequestration of his estate has been awarded and, in either case, he has not been discharged<sup>1</sup>. A person who so acts in relation to a company or an individual at a time when he is not qualified to do so is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>2</sup>.

1 See the Insolvency Act 1986 s 390(4)(a); and para 47 head (1) ante. As to insolvency practitioners and their qualification see para 42 et seq ante; and as to the application of s 390 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 47 note 1 ante.

2 Ibid ss 389(1), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante. Section 389 (as amended) does not apply to the official receiver: s 389(2) (amended by the Bankruptcy (Scotland) Act 1993 s 11(2)).

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 701 Prohibition on acting as an insolvency practitioner

TEXT AND NOTE 1--Further, a person is not qualified to act as an insolvency practitioner while a bankruptcy restrictions order (see PARA 646A.1) is in force in respect of him: Insolvency Act 1986 s 390(5) (added by the Enterprise Act 2002 Sch 21 para 4).

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### 702. Prohibition on acting as receiver or manager.

If a person being an undischarged bankrupt acts as receiver or manager of the property of a company on behalf of debenture holders, he is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>1</sup>.

1 See the Insolvency Act 1986 ss 31, 430, Sch 10; and COMPANIES vol 15 (2009) PARA 1346. For the meaning of 'the statutory maximum' see para 4 ante. Section 31 does not apply to a receiver or a manager acting under an appointment made by the court: s 31.

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **702 Prohibition on acting as receiver or manager**

TEXT AND NOTE 1--The provisions now also apply in the same way to a person who is the subject of a moratorium period under a debt relief order or a debt relief restrictions order (see PARA 123B), or a bankruptcy restrictions order (see PARA 646A.1): see the Insolvency Act 1986 s 31, Sch 10 (s 31 substituted by the Enterprise Act 2002 Sch 21 para 1, amended by the Tribunals, Courts and Enforcement Act 2007 Sch 20 para 2; Insolvency Act 1986 Sch 10 amended by the 2002 Act Sch 23 para 17(a), Sch 26).

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## **703. Prohibition on acting as director etc.**

It is an offence for a person who is an undischarged bankrupt to act as director of, or directly or indirectly to take part in or be concerned in the promotion, formation or management of, a company, except with the permission of the court<sup>1</sup>. In England and Wales, the permission of the court may not be given unless notice of intention to apply for it has been served on the official receiver; and it is the latter's duty, if he is of opinion that it is contrary to the public interest that the application should be granted, to attend on the hearing of the application and oppose it<sup>2</sup>.

A person guilty of an offence under the above provisions is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>3</sup>. The offence is one of strict liability<sup>4</sup>.

1 See the Company Directors Disqualification Act 1986 s 11(1); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1119. For these purposes, 'the court' is the court by which the person was adjudged bankrupt, or in Scotland, sequestration of his estate was awarded: s 11(2). As to disqualification orders generally see COMPANIES vol 15 (2009) PARA 1575 et seq. As to the application for permission see paras 704-706 post.

2 See *ibid* s 11(3); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1119.

3 *Ibid* s 13. For the meaning of 'the statutory maximum' see para 4 ante.

4 *R v Brockley* [1994] 1 BCLC 606, [1994] BCC 131, CA.

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 703 Prohibition on acting as director etc

TEXT AND NOTE 1--It is also an offence for a person in respect of whom a bankruptcy restrictions order (see PARA 646A.1) is in force to act as director of a company or directly or indirectly to take part in or be concerned in the promotion, formation or management of a company, without the leave of the court: Insolvency Act 1986 s 11(1) (substituted by the Enterprise Act 2002 Sch 21 para 5).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(iii) Disqualification of and Prohibitions on Bankrupt/B. PROHIBITIONS ON BANKRUPT/704. Application for permission to act as director etc.

### 704. Application for permission to act as director etc.

An application by a bankrupt for permission to act as director of, or to take part or be concerned in the promotion, formation or management of, a company<sup>1</sup>, must be supported by an affidavit<sup>2</sup> complying with the following provisions<sup>3</sup>.

The affidavit must identify the company and specify:

- 922 (1) the nature of its business or intended business, and the place or places where that business is, or is to be, carried on;
- 923 (2) whether it is, or is to be, a private or a public company;
- 924 (3) the persons who are, or are to be, principally responsible for the conduct of its affairs, whether as directors, shadow directors, managers or otherwise;
- 925 (4) the manner and capacity in which the applicant proposes to take part or be concerned in the promotion or formation of the company or, as the case may be, its management; and
- 926 (5) the emoluments and other benefits to be obtained from the directorship<sup>4</sup>.

If the company is already in existence, the affidavit must specify the date of its incorporation and the amount of its nominal and issued share capital; and, if not, it must specify the amount, or approximate amount, of its proposed commencing share capital, and the sources from which that capital is to be obtained<sup>5</sup>.

Where the bankrupt intends to take part or be concerned in the promotion or formation of a company, the affidavit must contain an undertaking by him that he will, within not less than seven days of the company being incorporated, file in court<sup>6</sup> a copy of its memorandum of association and certificate of incorporation<sup>7</sup>.

The court must fix a venue<sup>8</sup> for the hearing of the bankrupt's application, and give notice<sup>9</sup> to him accordingly<sup>10</sup>.

1 le under the Company Directors Disqualification Act 1986 s 11: see para 703 ante.

2 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

3 Ibid r 6.203(1).

- 4 Ibid r 6.203(2).
- 5 Ibid r 6.203(3).
- 6 For the meaning of 'file in court' see para 95 note 9 ante.
- 7 Insolvency Rules 1986, SI 1986/1925, r 6.203(4). The certificate of incorporation is issued under the Companies Act 1985 s 13: see COMPANIES vol 14 (2009) PARA 119.
- 8 For the meaning of 'venue' see para 84 note 21 ante.
- 9 As to mode of giving notice see para 797 post.
- 10 Insolvency Rules 1986, SI 1986/1925, r 6.203(5).

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **704 Application for permission to act as director etc**

TEXT AND NOTES--In SI 1986/1925 Pt 6 Ch 20 (rr 6.202A-6.205) a reference to a bankrupt includes a reference to a person in respect of whom a bankruptcy restrictions order is in force: r 6.202A (added by SI 2003/1730). As to bankruptcy restrictions orders see PARA 646A.

TEXT AND NOTES 6, 7--SI 1986/1925 r 6.203(4) amended: SI 2009/2472.

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### **705. Report of official receiver.**

Not less than 28 days before the date fixed for the hearing, the bankrupt must give to the official receiver and the trustee notice of the venue<sup>1</sup>, accompanied by copies of the application and affidavit<sup>2</sup>. Not less than 14 days before the date fixed for the hearing, the official receiver may file in court<sup>3</sup> a report of any matters which he considers ought to be drawn to the court's attention; and a copy of the report must be sent by him, forthwith after it is filed, to the bankrupt and to the trustee<sup>4</sup>. Not later than seven days before the date of the hearing, the bankrupt may file in court a notice specifying any statements in the official receiver's report which he intends to deny or dispute; if he so gives notice, he must send copies of it, not later than four days before the date of the hearing, to the official receiver and the trustee<sup>5</sup>.

The official receiver and the trustee may appear on the hearing of the application, and may make representations and put to the bankrupt such questions as the court may allow<sup>6</sup>.

1 For the meaning of 'venue' see para 84 note 21 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 6.204(1). As to the use of witness statements instead of affidavits in insolvency proceedings see r 7.57(5), (6) (as substituted); and para 793 post. As to the mode of giving notice see para 797 post; and as to application for permission see para 704 ante.

3 For the meaning of 'file in court' see para 95 note 9 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.204(2).

5 Ibid r 6.204(3).

6 Ibid r 6.204(4).

## UPDATE

### 647-706 Effect of bankruptcy on certain rights, transactions etc

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 705 Report of official receiver

TEXT AND NOTES--In SI 1986/1925 Pt 6 Ch 20 (rr 6.202A-6.205) a reference to a bankrupt includes a reference to a person in respect of whom a bankruptcy restrictions order is in force: r 6.202A (added by SI 2003/1730). As to bankruptcy restrictions orders see PARA 646A.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(15) EFFECT OF BANKRUPTCY ON CERTAIN RIGHTS, TRANSACTIONS ETC/(iii) Disqualification of and Prohibitions on Bankrupt/B. PROHIBITIONS ON BANKRUPT/706. Court's order on application.

### 706. Court's order on application.

If the court grants the bankrupt's application for permission to act as director of, or directly or indirectly to take part in or be concerned in the promotion, formation or management of, a company<sup>1</sup>, its order must specify that which by virtue of the order the bankrupt has permission to do<sup>2</sup>. The court may at the same time, having regard to any representations made by the trustee on the hearing of the application:

927 (1) include in the order provision varying an income payments order<sup>3</sup> already in force in respect of the bankrupt; or

928 (2) if no income payments order is in force, make one<sup>4</sup>.

Whether or not the application is granted, copies of the order must be sent by the court to the bankrupt, the trustee and the official receiver<sup>5</sup>.

1 le under the Company Directors Disqualification Act 1986 s 11: see para 703 ante. The policy of the legislature is strongly opposed to a bankrupt being given permission to act as a director or manager of a limited company: *Re McQuillan* (1989) 5 BCC 137.

2 Insolvency Rules 1986, SI 1986/1925, r 6.205(1).

3 As to income payments orders see para 449 et seq ante.

4 Insolvency Rules 1986, SI 1986/1925, r 6.205(2).

5 Ibid r 6.205(3).

## **UPDATE**

### **647-706 Effect of bankruptcy on certain rights, transactions etc**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **706 Court's order on application**

TEXT AND NOTES--In SI 1986/1925 Pt 6 Ch 20 (rr 6.202A-6.205) a reference to a bankrupt includes a reference to a person in respect of whom a bankruptcy restrictions order is in force: r 6.202A (added by SI 2003/1730). As to bankruptcy restrictions orders see PARA 646A.

NOTE 4--SI 1986/1925 r 6.205(2) amended: SI 2003/1730.

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## **(16) BANKRUPTCY OFFENCES**

### **(i) Offences under the Insolvency Act 1986**

#### **707. In general.**

The following provisions<sup>1</sup> apply where the court has made a bankruptcy order on a bankruptcy petition<sup>2</sup>; and they apply whether or not the bankruptcy order is annulled, but proceedings for an offence may not be instituted after the annulment<sup>3</sup>.

Without prejudice to his liability in respect of a subsequent bankruptcy, the bankrupt is not guilty of an offence under the following provisions in respect of anything done after his discharge; but nothing in the following provisions prevents the institution of proceedings against a discharged bankrupt for an offence committed before his discharge<sup>4</sup>.

It is not a defence in proceedings for an offence under the following provisions that anything relied on, in whole or in part, as constituting that offence was done outside England and Wales<sup>5</sup>.

Proceedings for an offence under the following provisions or under the Insolvency Rules 1986<sup>6</sup> may not be instituted except by the Secretary of State or by or with the consent of the Director of Public Prosecutions<sup>7</sup>.

1 Ie the Insolvency Act 1986 ss 350-362: see infra; and paras 708-723 post.

2 Ibid s 350(1). Section 350 is subject to s 360(3) (see para 721 note 4 post): s 350(1).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 350(1), (2), (4)-(6) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

Where a bankruptcy order is made under the Insolvency Act 1986 on or after 29 December 1986 (see para 2 ante), a person is not guilty of an offence under Pt IX Ch VI (ss 350-362) (see infra; and para 708 et seq post) in respect of anything done before that day; but, notwithstanding the repeal by the Insolvency Act 1985 of the Bankruptcy Act 1914, is guilty of an offence under the 1914 Act in respect of anything done before 29 December 1986 which would have been an offence under the 1914 Act if the making of the bankruptcy order had been the making of a receiving order under the 1914 Act; and the Insolvency Act 1986 s 350(5) (see infra) applies, instead of the Bankruptcy Act 1914 ss 157(2), 161, 165 (all repealed), in relation to proceedings for an offence under the 1914 Act which are instituted, whether by virtue of the above provisions or otherwise, after 29 December 1986: Insolvency Act 1986 s 437, Sch 11 para 18(1), (2).

3 Ibid s 350(2). As to annulment of bankruptcy orders see para 610 et seq ante.

4 Ibid s 350(3). As to discharge from bankruptcy see para 629 et seq ante.

5 Ibid s 350(4).

6 Ie the Insolvency Rules 1986, SI 1986/1925 (as amended).

7 Insolvency Act 1986 s 350(5). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1066, 1079 et seq.

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 707 In general

NOTE 4--The Insolvency Act 1986 s 350(3) is without prejudice to any provision of Pt IX Ch VI which applies to a person in respect of whom a bankruptcy restrictions order (see PARA 646A.1) is in force: s 350(3A) (added by the Enterprise Act 2002 Sch 21 para 2).

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### 708. Non-disclosure.

The bankrupt is guilty of an offence if:

929 (1) he does not to the best of his knowledge<sup>1</sup> and belief disclose all the property comprised in his estate<sup>2</sup> to the official receiver or the trustee; or

930 (2) he does not inform the official receiver or the trustee of any disposal<sup>3</sup> of any property which, but for the disposal, would be so comprised, stating how, when, to whom and for what consideration the property was disposed of<sup>4</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to



imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>5</sup>.

A person is not, however, guilty of such an offence if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud<sup>6</sup> or to conceal the state of his affairs<sup>7</sup>.

1 'Knowledge' includes the state of mind of a person who shuts his eyes to the obvious: see *James & Son Ltd v Smees* [1955] 1 QB 78 at 91, [1954] 3 All ER 274 at 278, DC per Parker J; *Westminster City Council v Croyalgrange Ltd* [1985] 1 All ER 740, DC (affd [1986] 2 All ER 353, [1986] 1 WLR 674, HL). Where a person deliberately refrains from making inquiries the result of which he may not wish to have, this can amount to knowledge: *Knox v Boyd* 1941 JC 82 at 86; *Taylor's Central Garages (Exeter) Ltd v Roper* (1951) 115 JP 445 at 449 per Devlin J; and see *Westminster City Council v Croyalgrange Ltd* supra and *Mallon v Allon* [1964] 1 QB 385 at 394, [1963] 3 All ER 843 at 847, DC. Mere neglect to ascertain what could have been found out by making reasonable inquiries is not tantamount to knowledge: *Taylor's Central Garages (Exeter) Ltd v Roper* supra; and cf *London Computator Ltd v Seymour* [1944] 2 All ER 11.

2 For these purposes, references to property comprised in the bankrupt's estate or to property possession of which is required to be delivered up to the official receiver or the trustee of the bankrupt's estate include any property which would be such property if a notice in respect of it were given under the Insolvency Act 1986 s 307 (after-acquired property: see para 445 et seq ante), s 308 (personal property and effects of bankrupt having more than replacement value: see para 392 ante) or s 308A (as added) (vesting in trustee of certain tenancies: see para 393 ante): s 351(a) (amended by the Housing Act 1988 s 140(1), Sch 17 para 75).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 351(a) (as so amended) does not apply: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

3 'Disposal' includes pledge: see *R v Juston* (1897) 61 JP 505 (decided under the Debtors Act 1869 s 11(15) (repealed)). Cf the Insolvency Act 1986 s 359(5), where references to disposing of property include pawning or pledging it: see paras 720, 721 post.

4 Ibid s 353(1). Section 353(1)(b) (see text head (2) supra) does not apply to any disposal in the ordinary course of a business carried on by the bankrupt or to any payment of the ordinary expenses of the bankrupt or his family: s 353(2). For the meaning of 'family' see para 216 note 8 ante. An act is done 'in the course of a business' if it is done as part of the activities of that business: *Charles R Davidson & Co v M'Robb (or Officer)* [1918] AC 304 at 321, HL per Lord Dunedin. See also *Haverling London Borough v Stevenson* [1970] 3 All ER 609, [1970] 1 WLR 1375, DC; *Wycombe Marsh Garages Ltd v Fowler* [1972] 3 All ER 248, [1972] 1 WLR 1156, DC; and see *Davies v Sumner* [1984] 3 All ER 831, [1984] 1 WLR 1301, HL. 'Business' includes a trade or profession: Insolvency Act 1986 s 436. It is not in the ordinary way of a grocer's business to dispose of goods by bill of sale: *R v Thomas* (1870) 22 LT 138.

5 Insolvency Act 1986 ss 350(6), 353(1), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante. A bankrupt who conceals assets and uses them to pay personal debts can expect to receive a custodial sentence: *R v Mungroo* [1997] 25 LS Gaz R 33, CA.

6 Prior to the coming into force of the Human Rights Act 1998 on 2 October 2000 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS), the requirement for an accused to prove that he has no intent to defraud was a legal, rather than an evidential, burden of proof; but since that date the requirement is an evidential, rather than a legal, burden of proof: *R v Daniel* (2002) Times, 8 April, CA.

7 Insolvency Act 1986 ss 352, 353(3).

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(16) BANKRUPTCY OFFENCES/(i) Offences under the Insolvency Act 1986/709. Concealment of property.

### 709. Concealment of property.

The bankrupt is guilty of an offence if:

- 931 (1) he does not deliver up possession to the official receiver or trustee<sup>1</sup>, or as the official receiver or trustee may direct, of such part of the property comprised in his estate<sup>2</sup> as is in his possession or under his control and possession of which he is required by law so to deliver up;
- 932 (2) he conceals any debt due to or from him or conceals<sup>3</sup> any property the value of which is not less than the prescribed amount<sup>4</sup> and possession of which he is required to deliver up to the official receiver or trustee; or
- 933 (3) in the 12 months before petition<sup>5</sup>, or in the initial period<sup>6</sup>, he did anything which would have been an offence under head (2) above if the bankruptcy order had been made immediately before he did it<sup>7</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>8</sup>.

A person is not, however, guilty of such an offence if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud<sup>9</sup> or to conceal the state of his affairs<sup>10</sup>.

1 As to the bankrupt's obligation to deliver up possession to the trustee see the Insolvency Act 1986 s 312(1); and para 396 ante.

2 For the meaning of references to property comprised in the bankrupt's estate see para 708 note 2 ante.

3 The bankrupt may be convicted if he is privy to a concealment by someone else, and the property need not have come into his hands: *R v Evani* (1825) 1 Mood CC 70. The concealment must be wilful, but any secreting is enough, even though a full disclosure is made later: *Courtivron v Meunier* (1851) 6 Exch 74 (decided under 5 & 6 Vict c 122 (1842) s 32 (repealed)).

4 For these purposes, the amount so prescribed is £500: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 3, Schedule Pt II. As to the Secretary of State's power to prescribe monetary limits see para 22 ante.

5 For these purposes, a reference to the number of months or years before petition is to that period ending with the presentation of the bankruptcy petition: Insolvency Act 1986 s 351(c). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 351(c) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

6 For these purposes, 'the initial period' means the period between the presentation of the bankruptcy petition (see para 124 et seq ante) and the commencement of the bankruptcy (see para 213 ante): Insolvency Act 1986 s 351(b). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 351(b) does not apply: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 28.

7 Insolvency Act 1986 s 354(1).

8 Ibid ss 350(6), 354(1), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

9 See para 708 note 6 ante.

10 Insolvency Act 1986 ss 352, 354(1).

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 709 Concealment of property

NOTE 4--The amount is now £1,000: SI 1986/1996 Schedule Pt II (substituted by SI 2004/547). SI 1986/1996 art 3 amended: SI 2009/465.

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### 710. Removal of property.

The bankrupt is guilty of an offence if he removes<sup>1</sup>, or in the initial period<sup>2</sup> removed, any property<sup>3</sup> the value of which was not less than the prescribed amount<sup>4</sup> and possession of which he has or would have been required to deliver up to the official receiver or the trustee<sup>5</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>6</sup>.

A person is not, however, guilty of such an offence if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud<sup>7</sup> or to conceal the state of his affairs<sup>8</sup>.

1 The fact that the trustee may have recovered the property does not in any way affect the bankrupt's criminal liability: *Re Ward, ex p Monkhouse* (1879) 40 LT 296; cf *DPP v Ashley* [1955] Crim LR 565.

2 For the meaning of 'the initial period' see para 709 note 6 ante.

3 For the meaning of references to property comprised in the bankrupt's estate see para 708 note 2 ante. As to the bankrupt's obligation to deliver up possession to the trustee see the Insolvency Act 1986 s 312(1); and para 396 ante. The property removed must form part of the bankrupt's estate. For the meaning of 'the bankrupt's estate' see para 216 ante. Where a debtor executed an assignment of his property to trustees for the benefit of his creditors which was not registered, and then fraudulently removed part of the assigned stock, a prosecution after a subsequent appointment of a trustee failed because, although the assignment, being unregistered, was void against the new trustee, it was otherwise in force and accordingly, when the debtor fraudulently removed the property, it was not his but belonged to the first trustees: *R v Creese* (1874) LR 2 CCR 105. Where, however, a trustee under an assignment never receives money kept back from him by an absconding debtor, the money is the debtor's property for these purposes: *R v Humphris* [1904] 2 KB 89.

4 For these purposes, the amount so prescribed is £500: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 3, Schedule Pt II. As to the Secretary of State's power to prescribe monetary limits see para 22 ante.

5 Insolvency Act 1986 s 354(2).

6 Ibid ss 350(6), 354(2), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

7 See para 708 note 6 ante.

8 Insolvency Act 1986 ss 352, 354(2).

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 710 Removal of property

NOTE 4--The amount is now £1,000: SI 1986/1996 Schedule Pt II (substituted by SI 2004/547). SI 1986/1996 art 3 amended: SI 2009/465.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(16) BANKRUPTCY OFFENCES/(i) Offences under the Insolvency Act 1986/711. Loss of property.

### 711. Loss of property.

The bankrupt is guilty of an offence if he without reasonable excuse<sup>1</sup> fails, on being required to do so by the official receiver or the court:

- 934 (1) to account for the loss of any substantial part of his property<sup>2</sup> incurred in the 12 months before petition<sup>3</sup> or in the initial period<sup>4</sup>; or
- 935 (2) to give a satisfactory explanation of the manner in which such a loss was incurred<sup>5</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>6</sup>.

1 What is a reasonable excuse is primarily a question of fact: see *Leck v Epsom RDC* [1922] 1 KB 383. However, ignorance of the statutory provisions provides no reasonable excuse (see *Aldridge v Warwickshire Coal Co Ltd* (1925) 133 LT 439, CA) nor does a mistaken view of the effect of those provisions (*R v Reid (Philip)* [1973] 3 All ER 1020, [1973] 1 WLR 1283, CA).

Quaere whether reliance on the advice of an expert can amount to a reasonable excuse: see *Saddleworth UDC v Aggregate and Sand Ltd* (1970) 69 LGR 103. Once evidence of a reasonable excuse emerges, it is for the prosecution to eliminate the existence of that defence to the satisfaction of the court: see *R v Clarke* [1969] 2 All ER 1008, [1969] 1 WLR 1109, CA.

2 For the meaning of references to property comprised in the bankrupt's estate see para 708 note 2 ante.

3 For the meaning of references a number of months before petition see para 709 note 5 ante.

4 For the meaning of 'the initial period' see para 709 note 6 ante.

5 Insolvency Act 1986 s 354(3).

6 Ibid ss 350(6), 354(3), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante. Section 354(3) creates an offence of strict liability which does not breach an accused's right to remain silent or not to incriminate himself: *R v Kearns* (2002) Times, 4 April, CA.

## **UPDATE**

### **707-724 Bankruptcy offences**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **711 Loss of property**

TEXT AND NOTE 2--Or on being required to do so by the trustee: Insolvency Act 1986 s 354(3) (amended by the Enterprise Act 2002 Sch 23 para 12).

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### **712. Non-delivery of books and papers.**

The bankrupt is guilty of an offence if he does not deliver up possession to the official receiver or the trustee<sup>1</sup>, or as the official receiver or trustee may direct, of all books, papers and other records of which he has possession or control and which relate to his estate<sup>2</sup> or his affairs<sup>3</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>4</sup>.

A person is not, however, guilty of such an offence if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud<sup>5</sup> or to conceal the state of his affairs<sup>6</sup>.

1 As to the bankrupt's duty to deliver up to the trustee possession of books, papers or other records see the Insolvency Act 1986 s 312(1) and para 396 ante; and as to the trustee's duty to take possession of books, papers and other records which related to the bankrupt's estate or affairs see s 311(1) and para 396 ante.

2 For the meaning of references to property possession of which is required to be delivered up to the official receiver or the trustee see para 708 note 2 ante.

3 Insolvency Act 1986 s 355(1).

4 Ibid ss 350(6), 355(1), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

5 See para 708 note 6 ante.

6 Insolvency Act 1986 ss 352, 355(1).

## **UPDATE**

### **707-724 Bankruptcy offences**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(16) BANKRUPTCY OFFENCES/(i) Offences under the Insolvency Act 1986/713. Concealment of books and papers.

### **713. Concealment of books and papers.**

The bankrupt is guilty of an offence if:

- 936 (1) he prevents<sup>1</sup>, or in the initial period<sup>2</sup> prevented, the production of any books, papers or other records relating to his estate<sup>3</sup> or affairs;
- 937 (2) he conceals, destroys, mutilates or falsifies, or causes or permits the concealment, destruction, mutilation or falsification of, any books, papers or other records relating to his estate or affairs;
- 938 (3) he makes, or causes<sup>4</sup> or permits<sup>5</sup> the making of, any false<sup>6</sup> entries in any book, document or record relating to his estate or affairs; or
- 939 (4) in the 12 months before petition<sup>7</sup>, or in the initial period, he did anything which would have been an offence under head (2) or head (3) above if the bankruptcy order had been made before he did it<sup>8</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>9</sup>.

A person is not, however, guilty of such an offence if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud<sup>10</sup> or to conceal the state of his affairs<sup>11</sup>.

1 'Prevents' means to render impossible: see *Tenants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495 at 518, HL.

2 For the meaning of 'the initial period' see para 709 note 6 ante.

3 For the meaning of references to property possession of which is required to be delivered up to the official receiver or the trustee see para 708 note 2 ante.

4 'Cause' involves some degree of dominance or control, or some express or positive mandate, from the person 'causing': *McLeod (or Houston) v Buchanan* [1940] 2 All ER 179 at 187, HL per Lord Wright; *Shave v Rosner* [1954] 2 QB 113, [1954] 2 All ER 280; *Lovelace v DPP* [1954] 3 All ER 481, [1954] 1 WLR 1468; *Shulton (Great Britain) Ltd v Slough Borough Council* [1967] 2 QB 471, [1967] 2 All ER 137; *A-G of Hong Kong v Tse Hung-Lit* [1986] AC 876, [1986] 3 All ER 173, PC. A person cannot be said to have 'caused' another to do or omit to do something unless he either knows or deliberately chooses not to know what it is that the other is doing or failing to do: *James & Son Ltd v Smees* [1955] 1 QB 78, [1954] 3 All ER 273; *Ross Hillman Ltd v Bond* [1974] QB 435, [1974] 2 All ER 287.

5 'Permit' denotes a general or particular permission, as distinguishable from a mandate, and the permission may be express or implied: *McLeod (or Houston) v Buchanan* [1940] 2 All ER 179, HL. To permit an offence to be committed involves a knowledge of the facts constituting the offence; but shutting one's eyes to the obvious, or allowing a person to do something in circumstances where a contravention is likely, not caring whether a contravention takes place or not, is sufficient: *James & Son Ltd v Smees* [1955] 1 QB 78 at 91, [1954] 3 All ER 273 at 278 per Parker J; *Gray's Haulage Co Ltd v Arnold* [1966] 1 All ER 896, [1966] 1 WLR 534. Reasonable grounds for suspicion that the offence will be committed may be sufficient but suspicion itself is not enough: *Sweet v Parsley* [1970] AC 132, [1969] 1 All ER 347, HL; *R v Souter* [1971] 2 All ER 1151, [1971] 1 WLR 1187,

CA. A person cannot permit unless he is in a position to forbid (*Goodbarne v Buck* [1940] 1 KB 771, [1940] 1 All ER 613, CA; *Lloyd v Singleton* [1953] 1 QB 357, [1953] 1 All ER 291); and no one can permit what he cannot control (*Tophams Ltd v Earl of Sefton* [1967] 1 AC 50, [1966] 1 All ER 1039, HL).

6 A statement may be false on account of what it omits, even though it is literally true: see *R v Lord Kylant* [1932] 1 KB 442; *R v Bishirgian* [1936] 1 All ER 586; and cf *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805 at 808, 809, [1951] 1 All ER 631 at 634, CA. Whether or not gain or advantage accrues from the false statement is irrelevant: see *Jones v Meatyard* [1939] 1 All ER 140; *Stevens & Steeds Ltd and Evans v King* [1943] 1 All ER 314; *Clear v Smith* [1981] 1 WLR 399; *Barrass v Reeve* [1980] 3 All ER 705, [1981] 1 WLR 408.

7 For the meaning of a reference to a number of months before petition see para 709 note 5 ante.

8 Insolvency Act 1986 s 355(2).

9 Ibid ss 350(6), 355(2), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

10 See para 708 note 6 ante.

11 Insolvency Act 1986 ss 352, 355(2).

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 713 Concealment of books and papers

TEXT AND NOTES 7, 8--In its application to a trading record, head (4) has effect as if the reference to 12 months were a reference to two years: 1986 Act s 355(4) (s 355(4), (5) added by the Enterprise Act 2002 Sch 23 para 13). 'Trading record' means a book, document or record which shows or explains the transactions or financial position of a person's business, including (1) a periodic record of cash paid and received; (2) a statement of periodic stock-taking; and (3) except in the case of goods sold by way of retail trade, a record of goods sold and purchased which identifies the buyer and seller or enables them to be identified: 1986 Act s 355(5) (as so added).

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### 714. Falsification of books etc.

The bankrupt commits an offence if:

940 (1) he disposes of, or alters or makes any omission in, or causes<sup>1</sup> or permits<sup>2</sup> the disposal, altering or making of any omission in, any book, document or record relating to his estate<sup>3</sup> or affairs; or

941 (2) in the 12 months before petition<sup>4</sup>, or in the initial period<sup>5</sup>, he did anything which would have been an offence under head (1) above if the bankruptcy order had been made before he did it<sup>6</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>7</sup>.

A person is not, however, guilty of such an offence if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud<sup>8</sup> or to conceal the state of his affairs<sup>9</sup>.

1 For the meaning of 'cause' see para 713 note 4 ante.

2 For the meaning of 'permit' see para 713 note 5 ante.

3 For the meaning of references to property possession of which is required to be delivered up to the official receiver or the trustee see para 708 note 2 ante.

4 For the meaning of a reference to a number of months before petition see para 709 note 5 ante.

5 For the meaning of 'the initial period' see para 709 note 6 ante.

6 Insolvency Act 1986 s 355(3).

7 Ibid ss 350(6), 355(3), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

8 See para 708 note 6 ante.

9 Insolvency Act 1986 ss 352, 355(3).

## **UPDATE**

### **707-724 Bankruptcy offences**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **714 Falsification of books etc**

TEXT AND NOTES 4-6--In its application to a trading record (see PARA 713 TEXT AND NOTES 7, 8), head (2) has effect as if the reference to 12 months were a reference to two years: Insolvency Act 1986 s 355(4), (5) (both added by the Enterprise Act 2002 Sch 23 para 13).

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### **715. Material omissions.**

The bankrupt is guilty of an offence if he makes or has made any material omission in any statement made under any provision of the Insolvency Act 1986<sup>1</sup> and relating to his affairs<sup>2</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>3</sup>.



A person is not, however, guilty of such an offence if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud<sup>4</sup> or to conceal the state of his affairs<sup>5</sup>.

1 Ibid the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

2 Ibid s 356(1). 'Any statement of affairs' will include a statement under s 256(2)(b) (voluntary arrangement: see para 93 ante), s 272(2) (debtor's petition: see para 159 ante), s 288(1) (bankruptcy petition made otherwise than on a debtor's petition: see para 244 ante) and under the Insolvency Rules 1986, SI 1986/1925 rr 6.66, 6.72 (further statement amplifying, modifying or explaining any matter in statement of affairs: see paras 251, 255 respectively ante). As to the admissibility in evidence of such statements of affairs see the Insolvency Act 1986 s 433 (as amended); and para 786 post.

3 Ibid ss 350(6), 356(1), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

4 See para 708 note 6 ante.

5 Insolvency Act 1986 ss 352, 356(1).

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 716. False statements.

The bankrupt is guilty of an offence if:

- 942 (1) knowing or believing that a false debt has been proved by any person under the bankruptcy, he fails to inform the trustee as soon as practicable; or
- 943 (2) he attempts to account for any part of his property<sup>1</sup> by fictitious losses or expenses; or
- 944 (3) at any meeting of his creditors in the 12 months before petition<sup>2</sup> or, whether or not at such a meeting, at any time in the initial period<sup>3</sup>, he did anything which would have been an offence under head (2) above if the bankruptcy order had been made before he did it; or
- 945 (4) he is, or at any time has been, guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors, or any of them, to an agreement with reference to his affairs or to his bankruptcy<sup>4</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>5</sup>.

1 For the meaning of references to property comprised in the bankrupt's estate see para 708 note 2 ante.

2 For the meaning of a reference to a number of months before petition see para 709 note 5 ante.

3 For the meaning of 'the initial period' see para 709 note 6 ante.

4 Insolvency Act 1986 s 356(2). As to the modification of the Insolvency Act 1986 s 356(2) by the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) in relation to the bankruptcy of an individual member of an insolvent partnership see para 820 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1246.

5 Insolvency Act 1986 ss 350(6), 356(2), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(16) BANKRUPTCY OFFENCES/(i) Offences under the Insolvency Act 1986/717. Fraudulent disposal of property.

#### 717. Fraudulent disposal of property.

The bankrupt is guilty of an offence if:

- 946 (1) he makes or causes<sup>1</sup> to be made, or has in the period of five years ending with the commencement of the bankruptcy<sup>2</sup> made or caused to be made, any gift or transfer of, or any charge on, his property<sup>3</sup>; or
- 947 (2) he conceals or removes, or has at any time before commencement of the bankruptcy concealed or removed, any part of his property after, or within two months before, the date on which a judgment or order for the payment of money has been obtained against him, being a judgment or order which was not satisfied before the commencement of the bankruptcy<sup>4</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>5</sup>.

A person is not, however, guilty of such an offence if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud<sup>6</sup> or to conceal the state of his affairs<sup>7</sup>.

1 For the meaning of 'cause' see para 713 note 4 ante.

2 As to the commencement of bankruptcy see para 213 ante.

3 For the meaning of references to property comprised in the bankrupt's estate see para 708 note 2 ante. For these purposes, the reference to making a transfer of or charge on any property includes causing or conniving at the levying of any execution against that property: Insolvency Act 1986 s 357(2). 'Conniving' imports knowledge together with acquiescence in the facts constituting the offence. Suspicion may, however, be enough, although mere negligence is not: *Rogers v Rogers* (1830) 3 Hag Ecc 57.

4 Insolvency Act 1986 s 357(1), (3).

5 Ibid ss 350(6), 357(1), (3), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

6 See para 708 note 6 ante.

7 Insolvency Act 1986 ss 352, 357(1), (3).

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(16) BANKRUPTCY OFFENCES/(i) Offences under the Insolvency Act 1986/718. Absconding.

### 718. Absconding.

The bankrupt is guilty of an offence if:

- 948 (1) he leaves, or attempts or makes preparations to leave, England and Wales with any property<sup>1</sup> the value of which is not less than the prescribed amount<sup>2</sup> and possession of which he is required to deliver up to the official receiver or the trustee; or
- 949 (2) in the six months before petition<sup>3</sup>, or in the initial period<sup>4</sup>, he did anything which would have been an offence under head (1) above if the bankruptcy order had been made immediately before he did it<sup>5</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>6</sup>.

A person is not, however, guilty of such an offence if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud<sup>7</sup> or to conceal the state of his affairs<sup>8</sup>.

1 For the meaning of references to property comprised in the bankrupt's estate see para 708 note 2 ante.

2 For these purposes, the amount so prescribed is £500: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 3, Schedule Pt II. As to the Secretary of State's power to prescribe monetary limits see para 22 ante.

3 For the meaning of a reference to a number of months before petition see para 709 note 5 ante.

4 For the meaning of 'the initial period' see para 709 note 6 ante.

5 Insolvency Act 1986 s 358; and see *R v Humphris* [1904] 2 KB 89; *R v Pitchforth* (1908) 1 Cr App Rep 249, CCA.

6 Insolvency Act 1986 ss 350(6), 358, 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

7 See para 708 note 6 ante.

8 Insolvency Act 1986 ss 352, 358.

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 718 Absconding

NOTE 2--The amount is now £1,000: SI 1986/1996 Schedule Pt II (substituted by SI 2004/547). SI 1986/1996 art 3 amended: SI 2009/465.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(16) BANKRUPTCY OFFENCES/(i) Offences under the Insolvency Act 1986/719. Fraudulent dealing with property obtained on credit.

### 719. Fraudulent dealing with property obtained on credit.

The bankrupt is guilty of an offence if, in the 12 months before petition<sup>1</sup>, or in the initial period<sup>2</sup>, he disposed of any property<sup>3</sup> which he had obtained on credit and, at the time he disposed of it, had not paid for<sup>4</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>5</sup>.

A person is not, however, guilty of such an offence if:

- 950 (1) he proves that, at the time of the conduct constituting the offence, he had no intent to defraud or to conceal the state of his affairs<sup>6</sup>; or
- 951 (2) the disposal, acquisition or receipt of the property was in the ordinary course of a business carried on by the bankrupt at the time of the disposal, acquisition or receipt<sup>7</sup>.

1 For the meaning of a reference to a number of months before petition see para 709 note 5 ante.

2 For the meaning of 'the initial period' see para 709 note 6 ante.

3 For the meaning of references to property comprised in the bankrupt's estate see para 708 note 2 ante.

4 Insolvency Act 1986 s 359(1). In determining for these purposes whether any property is disposed of, acquired or received in the ordinary course of a business carried on by the bankrupt, regard may be had, in particular, to the price paid for the property: s 359(4). For the meaning of 'in the ordinary course of business' see para 708 note 4 ante. In s 359 references to disposing of property include pawning or pledging it; and references to acquiring or receiving property are to be construed accordingly: s 359(5).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 359(1) does not apply, but s 359(3)-(5) does apply: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 29. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 Insolvency Act 1986 ss 350(6), 359(1), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante. As to the application of s 350 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 707 note 2 ante.

6 Ibid ss 352, 359(1).

7 Ibid s 359(3). See also note 4 supra.

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(16) BANKRUPTCY OFFENCES/(i) Offences under the Insolvency Act 1986/720. Fraudulent dealing by person with bankrupt.

### 720. Fraudulent dealing by person with bankrupt.

A person is guilty of an offence if, in the 12 months before petition<sup>1</sup> or in the initial period<sup>2</sup>, he acquired or received property<sup>3</sup> from the bankrupt knowing or believing that the bankrupt owed money in respect of the property, and that the bankrupt did not intend, or was unlikely to be able, to pay the money he so owed<sup>4</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>5</sup>.

A person is not, however, guilty of such an offence if the disposal, acquisition or receipt of the property was in the ordinary course of a business carried on by the bankrupt at the time of the disposal, acquisition or receipt<sup>6</sup>.

1 For the meaning of a reference to a number of months before petition see para 709 note 5 ante.

2 For the meaning of 'the initial period' see para 709 note 6 ante.

3 For the meaning of references to property comprised in the bankrupt's estate see para 708 note 2 ante.

4 Insolvency Act 1986 s 359(2). In determining, for these purposes, whether any property is disposed of, acquired or received in the ordinary course of a business carried on by the bankrupt, regard may be had, in particular, to the price paid for the property: s 359(4). For the meaning of 'in the ordinary course of business' see para 708 note 4 ante. In s 359 references to disposing of property include pawning or pledging it; and references to acquiring or receiving property are to be read accordingly: s 359(5).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 359(2)-(5) applies, save that: (1) in s 359(2) for the words 'petition or initial period' there are to be substituted the words 'the date of death of the deceased debtor'; and (2) in s 359(3) the reference to s 359(1) is to be omitted: Administration of Insolvent Estates of Deceased Persons

Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 29. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

5 Insolvency Act 1986 ss 350(6), 359(2), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante. As to the application of s 350 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 707 note 2 ante.

6 Ibid s 359(3). See also note 4 supra.

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(16) BANKRUPTCY OFFENCES/(i) Offences under the Insolvency Act 1986/721. Obtaining credit; engaging in business.

#### 721. Obtaining credit; engaging in business.

The bankrupt is guilty of an offence if:

- 952 (1) either alone or jointly with any other person, he obtains credit<sup>1</sup> to the extent of the prescribed amount<sup>2</sup> or more without giving the person from whom he obtains it the relevant information about his status<sup>3</sup>; or
- 953 (2) he engages, whether directly or indirectly, in any business under a name other than that in which he was adjudged bankrupt without disclosing to all persons with whom he enters into any business transaction the name in which he was so adjudged<sup>4</sup>.

The offence does not require proof of dishonesty<sup>5</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>6</sup>.

1 For these purposes, the reference to the bankrupt obtaining credit includes the following cases: (1) where goods are bailed to him under a hire-purchase agreement, or agreed to be sold to him under a conditional sale agreement; and (2) where he is paid in advance, whether in money or otherwise, for the supply of goods or services: Insolvency Act 1986 s 360(2). 'Hire-purchase agreement' and 'conditional sale agreement' have the same meaning as in the Consumer Credit Act 1974 (see CONSUMER CREDIT vol 9(1) (Reissue) paras 95, 93 respectively): Insolvency Act 1986 s 436.

As to the application of s 436 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 21 note 11 ante.

A bankrupt who obtains credit for a third party does not commit an offence unless the third party is a company set up for this purpose by the bankrupt: *R v Godwin* (1980) 71 Cr App Rep 97, CA. There need be no agreement to give credit if credit is in fact given: *R v Peters* (1886) 16 QBD 636. Obtaining a cheque in consideration of an immediate dispatch of goods was held not to constitute obtaining credit in *Osborn v Barton* (1949) 66 (pt 1) TLR 115, DC.

2 For these purposes, the amount so prescribed is £250: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 3, Schedule Pt II. As to the Secretary of State's power to prescribe monetary limits see para 22 ante. The offence is 'obtaining' credit not 'ordering' credit to the extent of the prescribed amount: see *R v Juby* (1886) 55 LT 788 (where the accused, having received goods of a value under the prescribed limit which he had not ordered, then ordered more goods, bringing the aggregate debt over the prescribed limit). The prescribed amount may be reached by aggregating a series of smaller sums and, once that figure is reached, any repayments count only in mitigation of the penalty: *R v Hartley* [1972] 2 QB 1, [1972] 1 All ER 599, CA.

A contract obtained without the required disclosure by which an undischarged bankrupt becomes entitled to credit of the prescribed amount or more is unenforceable: *De Choisy v Hynes* [1937] 4 All ER 54.

3 Insolvency Act 1986 s 360(1)(a). For these purposes, the relevant information about the status of the person in question is the information that he is an undischarged bankrupt or, as the case may be, that his estate has been sequestrated in Scotland and that he has not been discharged: s 360(4).

Disclosure need not necessarily be made at the moment when credit is obtained, provided that it was made at a reasonable time before the transaction took place: *R v Zeitlin* (1932) 23 Cr App Rep 163, CCA. The obligation to disclose bankruptcy is absolute; reasonable belief that such disclosure has been made is no defence: *R v Duke of Leinster* [1924] 1 KB 311, CCA. As to discharge from bankruptcy see para 629 et seq ante.

4 Insolvency Act 1986 s 360(1)(b). A person whose estate has been sequestrated in Scotland or who has been adjudged bankrupt in Northern Ireland is guilty of an offence if, before his discharge, he does anything in England and Wales which would be an offence under s 360(1) if he were an undischarged bankrupt and the sequestration of his estate or the adjudication in Northern Ireland were an adjudication under Pt IX (ss 264-371) (as amended): s 360(3).

5 *R v Ramzan* [1998] 2 Cr App Rep 328, CA.

6 Insolvency Act 1986 ss 350(6), 360(1), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

## UPDATE

### 707-724 Bankruptcy offences

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### 721 Obtaining credit; engaging in business

TEXT AND NOTES--The Insolvency Act 1986 s 360 applies to the bankrupt after discharge while a bankruptcy restrictions order (see PARA 646A.1) is in force in respect of him: s 360(5) (s 360(5), (6) added by the Enterprise Act 2002 Sch 21 para 3).

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTES 1-3--For the purposes of head (1) as it applies to the bankrupt after discharge while a bankruptcy restrictions order is in force in respect of him, the relevant information about his status is the information that a bankruptcy restrictions order is in force in respect of him: 1986 Act s 360(6) (as added: see TEXT AND NOTES).

NOTE 2--The amount is now £500: SI 1986/1996 Schedule Pt II (substituted by SI 2004/547). SI 1986/1996 art 3 amended: SI 2009/465.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(16) BANKRUPTCY OFFENCES/(i) Offences under the Insolvency Act 1986/722. Failure to keep proper accounts of business.

## **722. Failure to keep proper accounts of business.**

Where the bankrupt has been engaged in any business for any period of two years before petition<sup>1</sup>, he is guilty of an offence if he:

- 954 (1) has not kept proper accounting records throughout that period and throughout any part of the initial period<sup>2</sup> in which he was so engaged; or
- 955 (2) has not preserved all the accounting records which he has kept<sup>3</sup>.

For these purposes, a person is deemed not to have kept proper accounting records<sup>4</sup> if he has not kept such records as are necessary to show or explain his transactions and financial position in his business, including:

- 956 (a) records containing entries from day to day, in sufficient detail, of all cash paid and received;
- 957 (b) where the business involved dealings in goods, statements of annual stocktakings; and
- 958 (c) except in the case of goods sold by way of retail trade<sup>5</sup> to the actual customer, records of all goods sold and purchased showing the buyers and sellers in sufficient detail to enable the goods and the buyers and sellers to be identified<sup>6</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>7</sup>.

The bankrupt is not, however, guilty of an offence under the above provisions if his unsecured liabilities at the commencement of the bankruptcy did not exceed the prescribed amount<sup>8</sup>, or if he proves that in the circumstances in which he carried on business the omission was honest and excusable<sup>9</sup>.

1 For the meaning of a reference to a number of years before petition see para 709 note 5 ante.

2 For the meaning of 'the initial period' see para 709 note 6 ante.

3 Insolvency Act 1986 s 361(1).

4 In relation to any such records as are mentioned in *ibid* s 361(3), s 355(2)(d), (3)(b) (see paras 713 head (4), 714 head (2) respectively ante) applies with the substitution of two years for 12 months: s 361(4).

5 A sale by retail is a sale to a person buying for his own use or consumption, and a sale by wholesale is a sale to a person who buys for resale in the course of trade: *Chappell & Co Ltd v Nestlé Co Ltd* [1958] Ch 529, [1958] 2 All ER 155, CA; on appeal [1960] AC 87, [1959] 2 All ER 701, HL.

6 Insolvency Act 1986 s 361(3).

7 *Ibid* ss 350(6), 361(1), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

8 For these purposes, the amount so prescribed is £20,000: Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 3, Schedule Pt II. As to the Secretary of State's power to prescribe monetary limits see para 22 ante.



9 Insolvency Act 1986 s 361(2). There may be circumstances in which the omission is honest but not excusable, as where, despite the absence of criminal intent, there is gross negligence: *R v Dandridge* (1931) 22 Cr App Rep 156, CCA.

## UPDATE

### 707-724 Bankruptcy offences

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### 722 Failure to keep proper accounts of business

TEXT AND NOTES--Insolvency Act 1986 s 361 repealed: Enterprise Act 2002 s 263(a), Sch 26.

NOTE 7--1986 Act Sch 10 amended: 2002 Act Sch 23 para 17(b), Sch 26.

NOTE 8--SI 1986/1996 art 3 amended: SI 2009/465.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(16) BANKRUPTCY OFFENCES/(i) Offences under the Insolvency Act 1986/723. Gambling.

### 723. Gambling.

The bankrupt is guilty of an offence if he has:

- 959 (1) in the two years before petition<sup>1</sup>, materially<sup>2</sup> contributed to, or increased the extent of, his insolvency by gambling or by rash and hazardous speculations; or
- 960 (2) in the initial period<sup>3</sup>, lost any part of his property<sup>4</sup> by gambling or by rash and hazardous speculations<sup>5</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>6</sup>.

1 For the meaning of a reference to a number of years before petition see para 709 note 5 ante.

2 The word 'materially' governs both 'contributed to' and 'increased': *R v P (a bankrupt)* [2000] 1 WLR 1568, [2000] BPIR 1138, CA (prosecution had to prove that the increase in the extent of the accused's insolvency attributable to gambling was material).

3 For the meaning of 'the initial period' see para 709 note 6 ante.

4 For the meaning of references to property comprised in the bankrupt's estate see para 708 note 2 ante.

5 Insolvency Act 1986 s 362(1). In determining, for these purposes, whether any speculations were rash and hazardous, the financial position of the bankrupt at the time when he entered into them must be taken into consideration: s 362(2). In bringing a case under s 362(1)(a) (see text head (1) supra) the prosecution is entitled to use documentary material obtained by the official receiver pursuant to s 291(1) (see para 243 ante): *A-G's Reference (No 7 of 2000)* [2001] EWCA Crim 888, [2001] 1 WLR 1879.

6 Insolvency Act 1986 ss 350(6), 362(1), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

## UPDATE

### 707-724 Bankruptcy offences

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 723 Gambling

TEXT AND NOTES--Insolvency Act 1986 s 362 repealed: Enterprise Act 2002 s 263(b), Sch 26.

NOTE 5--The 1986 Act s 326(1)(a) (see TEXT head (1)) creates an offence of strict liability: *R v Muhamad* [2002] EWCA Crim 1856, [2002] All ER (D) 289 (Jul).

NOTE 6--1986 Act Sch 10 amended: 2002 Act Sch 23 para 17(b), Sch 26.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(16) BANKRUPTCY OFFENCES/(ii) Offences under the Debtors Act 1869/724. Offences committed by any debtor.

## (ii) Offences under the Debtors Act 1869

### 724. Offences committed by any debtor.

Any person is guilty of an offence<sup>1</sup> and liable on conviction to imprisonment for a term not exceeding one year<sup>2</sup>, whether or not he is insolvent<sup>3</sup>:

- 961 (1) if he has made or caused to be made any gift, delivery<sup>4</sup>, or transfer<sup>5</sup> of, or any charge on, his property, with intent to defraud<sup>6</sup> his creditors<sup>7</sup>, or any of them<sup>8</sup>;
- 962 (2) if he has concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him, with intent to defraud<sup>9</sup> his creditors<sup>10</sup>.

1 The offence of obtaining credit by fraud, created by the Debtors Act 1869 s 13(1) (repealed), and by the Bankruptcy Act 1914 s 156(a) (repealed) is now covered by the offences of obtaining a pecuniary advantage by deception (see the Theft Act 1968 s 16 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 312), obtaining services by deception (see the Theft Act 1978 s 1; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 313), evasion of liability by deception (see s 2; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 314), and making off without payment (see s 3; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 315).

2 Debtors Act 1869 s 13. The Criminal Law Act 1967 s 1(1) abolished the distinction between felonies and misdemeanours; and the Criminal Justice Act 1948 s 1(1) abolished the right to impose hard labour. These offences are triable either summarily or on indictment: see the Magistrates' Courts Act 1980 s 17, Sch 1 para 7; and MAGISTRATES vol 29(2) (Reissue) para 655.

3 *R v Rowlands* (1882) 8 QBD 530.

4 A debtor does not, however, commit this offence by selling part of his assets below their value, even though his creditors may be prejudiced by it: *Re Cranston, ex p Cranston* (1892) 9 Morr 160.

5 'Transfer' includes a fictitious transfer: *R v Richman* (1910) 4 Cr App Rep 233, CCA.

6 A distinction has been drawn between 'defrauding' and 'deceiving'; there may be deceit without the creditors being cheated out of anything which is what 'defraud' implies: see *R v Ingham* (1859) 8 Cox CC 240; *Re London and Globe Finance Corp Ltd* [1903] 1 Ch 728 at 732, considered in *R v Wines* [1953] 2 All ER 1497, [1954] 1 WLR 64, CCA, and in *Welham v DPP* [1961] AC 103, [1960] 1 All ER 805, HL. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE.

7 The person intended to be defrauded must be an actual creditor at the time of the act, not merely a potential creditor: *R v Hopkins* [1896] 1 QB 652 (person who has brought an action against the debtor for unliquidated damages but has not obtained judgment is not a creditor).

8 Debtors Act 1869 s 13(2).

9 See note 6 supra.

10 Debtors Act 1869 s 13(3). The intention proved must be to defraud all creditors generally. In *R v Rowlands* (1882) 8 QBD 530, the debtor, not a bankrupt, had endeavoured to defeat a judgment creditor and was convicted of this offence. As the indictment charged an intent to defraud 'creditors', however, and there was no evidence that there were other creditors, the conviction was quashed. Quaere whether a conviction would have stood if it had been proved that there was only one creditor or that the fraud practised on one was intended to be tried on all.

## UPDATE

### 707-724 Bankruptcy offences

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### 724 Offences committed by any debtor

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(i) Enforcement Procedures/725. Enforcement of court orders.

## (17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS

### (i) Enforcement Procedures

#### 725. Enforcement of court orders.

In any insolvency proceedings<sup>1</sup>, orders of the court may be enforced in the same manner as a judgment to the same effect<sup>2</sup>. The High Court and the county courts have jurisdiction throughout England and Wales for the purposes<sup>3</sup> of individual insolvency<sup>4</sup>. For those purposes, a county court has, in addition to its ordinary jurisdiction, all the powers and jurisdiction of the High Court; and the orders of the court may be enforced accordingly in the prescribed manner<sup>5</sup>.

Where an order in insolvency proceedings is made, or any process is issued, by a county court ('the primary court'), the order or process may be enforced, executed and dealt with by any other county court ('the secondary court'), as if it had been made or issued for the enforcement of a judgment or order to the same effect made by the secondary court; and this provision applies whether or not the secondary court has jurisdiction to take insolvency proceedings<sup>6</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.19(1). As to orders of the High Court see CPR Sch 1, RSC Ord 45 rr 1-5; and CIVIL PROCEDURE. An application to make an order of the House of Lords an order of the Chancery Division should be made to the court of first instance: *British Dynamite Co v Krebs* (1879) 11 ChD 448. For the prescribed form of warrant for committal for contempt see the Insolvency Rules 1986, SI 1986/1925, r 12.7(1), (2), Sch 4, Form 7.17.

3 Ie for the purposes of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

4 See *ibid* s 373(1); and para 6 ante. As to the application of s 373 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 6 note 2 ante.

A writ of execution to enforce any order made in insolvency proceedings in the High Court may be issued on the authority of a registrar: *Practice Direction-Insolvency Proceedings* para 1.5.

5 See the Insolvency Act 1986 s 373(2); and para 6 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 7.19(2). As to enforcing orders in county courts see COURTS.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 725 Enforcement of court orders

NOTE 2--SI 1986/1925 Sch 4 Form 7.17 revoked: SI 2010/686.

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### 726. Warrants.

A warrant issued by the court under any provision of the Insolvency Act 1986 must be addressed to such officer of the High Court or of a county court, whether or not having jurisdiction in insolvency proceedings<sup>1</sup>, as the warrant specifies, or to any constable<sup>2</sup>.

For the purposes of the court's powers of enforcement<sup>3</sup>, the prescribed officers of the court are, in the case of the High Court, the tipstaff and his assistants of the court, and, in the case of a county court, the district judge and the bailiffs<sup>4</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 Insolventcy Rules 1986, SI 1986/1925, r 7.21(1).

3 le under the Insolventcy Act 1986 s 364(1) (arrest of debtor to whom a bankruptcy petition relates or of an undischarged bankrupt, or of a discharged bankrupt whose estate is still being administered and for the seizure of books, papers, records, money or goods in the possession of a person arrested under the warrant: see para 221 ante), s 365(3) (search for books, papers or records relating to bankrupt's estate or affairs concealed in premises not belonging to him: see para 220 ante), s 366(3) (arrest of bankrupt, bankrupt's spouse or former spouse, any person known or believed to have any property comprised in the bankrupt's estate in his possession or to be indebted to the bankrupt, or any person appearing to the court to be able to give information concerning the bankrupt or the bankrupt's dealings, affairs or property, and for the seizure of any books, papers, records, money or goods in that person's possession: see para 313 ante).

4 Insolventcy Rules 1986, SI 1986/1925, r 7.21(2); Courts and Legal Services Act 1990 s 74(1)(a). For the prescribed forms of order of discharge from custody under the Insolventcy Act 1986 see the Insolventcy Rules 1986, SI 1986/1925, r 12.7(1), (2), Sch 4, Form 7.14 (general), Form 7.18 (custody on contempt).

## UPDATE

### 725-816 Practice and procedure in insolventcy proceedings

The terminology used in the Insolventcy Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 726 Warrants

NOTE 4--SI 1986/1925 r 7.21(2) amended: SI 2009/642. SI 1986/1925 Sch 4 Forms 7.14, 7.188 revoked: SI 2010/686.

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### 727. Execution of warrants outside court's district.

Where a warrant for a person's arrest has been issued in insolventcy proceedings<sup>1</sup> by a county court ('the primary court') and is addressed to another county court ('the secondary court') for execution in its district<sup>2</sup>, the secondary court may send the warrant to the district judge of any other county court, whether or not having jurisdiction to take insolventcy proceedings, in whose district the person to be arrested is or is believed to be, with a notice to the effect that the warrant is transmitted to that court under this provision for execution in its district at the request of the primary court<sup>3</sup>. The court receiving a warrant so transmitted by the secondary court must apply its seal to the warrant, and secure that all such steps are taken for its execution as would be appropriate in the case of a warrant issued by itself<sup>4</sup>.

1 For the meaning of 'insolventcy proceedings' see para 35 note 4 ante.

2 For the prescribed form of warrant to the district judge of a court in whose district a person against whom a warrant of arrest has been issued is believed to be see the Insolventcy Rules 1986, SI 1986/1925, rr 7.24, 12.7(1), (2), Sch 4, Form 7.10.

3 Ibid r 7.24(1), (2); Courts and Legal Services Act 1990 s 74(1)(a). For the prescribed form of indorsement of warrant of arrest issued by the court to which the same has been sent for execution by the court which originally issued it see the Insolventcy Rules 1986, SI 1986/1925, Sch 4, Form 7.11.

4 Ibid r 7.24(3). As to execution of warrants throughout the United Kingdom see para 728 post.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **727 Execution of warrants outside court's district**

NOTES 2, 3--SI 1986/1925 Sch 4 Forms 7.10, 7.11 revoked: SI 2010/686.

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## **(ii) Co-operation between Courts**

### **728. Co-operation between courts exercising jurisdiction in relation to insolvency.**

An order made by a court in any part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law<sup>1</sup> must be enforced in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction in that other part<sup>2</sup>. Without prejudice to the following provisions, such duty does not, however, require a court in any part of the United Kingdom to enforce, in relation to property situated in that part, any order made by a court in any other part of the United Kingdom<sup>3</sup>.

The Secretary of State, with the concurrence, in relation to property situated in England and Wales, of the Lord Chancellor, may by order make provision for securing that a trustee or assignee under the insolvency law of any part of the United Kingdom has, with such modifications as may be specified in the order, the same rights in relation to any property situated in another part of the United Kingdom as he would have in the corresponding circumstances if he were a trustee or assignee under the insolvency law of that other part<sup>4</sup>.

The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom must assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory<sup>5</sup>. For these purposes, a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction; and, in exercising its discretion under this provision, a court must have regard, in particular, to the rules of private international law<sup>6</sup>.

The provisions<sup>7</sup> relating to the execution of warrants of arrest throughout the United Kingdom apply to a warrant which, in exercise of any jurisdiction in relation to insolvency law, is issued in any part of the United Kingdom for the arrest of a person as they apply to a warrant issued in that part of the United Kingdom for the arrest of a person charged with an offence<sup>8</sup>.

1 For these purposes, 'insolvency law' means: (1) in relation to England and Wales, provision extending to England and Wales and made by or under the Insolvency Act 1986 or the Company Directors Disqualification Act 1986 ss 1A (as added), 6-10 (as amended), 12-15, 19(c), 20 (with Sch 1 (as amended)) and ss 1-17 (as amended) as they apply for the purposes of those provisions of that Act; (2) in relation to Scotland, provision extending to Scotland and made by or under the Insolvency Act 1986, the Company Directors Disqualification Act 1986 ss 1A (as added), 6-10 (as amended), 12-15, 19(c), 20 (with Sch 1 (as amended)) and ss 1-17 (as amended) as they apply for the purposes of those provisions of that Act, the Companies Act 1985 Pt XVIII (ss 462-487) or the Bankruptcy (Scotland) Act 1985; (3) in relation to Northern Ireland, provision made by or under the Insolvency (Northern Ireland) Order 1989, SI 1989/2402; (4) in relation to any relevant country or territory, so much of the law of that country or territory as corresponds to provisions falling within any of heads (1)-(3) supra; and references supra to any enactment include, in relation to any time before the coming into force of that enactment, the corresponding enactment in force at that time: Insolvency Act 1986 s 426(10) (amended by the Insolvency (Northern Ireland) Order 1989, SI 1989/2402, art 381(2), Sch 9 Pt II para 41(b); the Insolvency Act 2000 s 8, Sch 4 para 16(1), (3)(a), (b)). For the meaning of 'relevant country or territory' see note 5 infra. In the application of the Insolvency Act 1986 s 426 (as amended) to Northern Ireland, for any reference to the Secretary of State there must be substituted a reference to the Department of Economic Development in Northern Ireland: s 426(12)(a) (added by the Insolvency (Northern Ireland) Order 1989, SI 1989/2402, Sch 9 Pt II para 41(b)).

The references to insolvency law in the Insolvency Act 1986 s 426 (as amended) include, in relation to a part of the United Kingdom, the provisions made by or under the Companies Act 1989 Pt VII (ss 154-191) (financial markets and insolvency: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 509 et seq) and, in relation to a relevant country or territory within the meaning of the Insolvency Act 1986 s 426 (as amended), so much of the law of that country or territory as corresponds to any provisions made by or under the Companies Act 1989 Pt VII (ss 154-191): s 183(1). A court must not, in pursuance of the Insolvency Act 1986 s 426 (as amended) or any other enactment or rule of law, recognise or give effect to: (a) any order of a court exercising jurisdiction in relation to insolvency law in a country or territory outside the United Kingdom; or (b) any act of a person appointed in such a country or territory to discharge any functions under insolvency law, in so far as the making of the order or the doing of the act would be prohibited in the case of a court in the United Kingdom or a relevant office-holder by provisions made by or under the Companies Act 1989 Pt VII (ss 154-191): s 183(2). Section 183(2) does not affect the recognition or enforcement of a judgment required to be recognised or enforced under or by virtue of the Civil Jurisdiction and Judgments Act 1982 (see CONFLICT OF LAWS): Companies Act 1989 s 183(3).

'Insolvency law' includes the court's ancillary jurisdiction where it assists in connection with the insolvency proceeding, such as the court's power to grant injunctive relief: *Hughes v Hannover Rückversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497, [1997] BCC 921, CA.

2 Insolvency Act 1986 s 426(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 426 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

3 Insolvency Act 1986 s 426(2).

4 Ibid s 426(3). An order under s 426(3) must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 426(9). At the date at which this volume states the law no such order had been made.

Where a person who is a trustee or assignee under the insolvency law of any part of the United Kingdom claims property situated in any other part of the United Kingdom, whether by virtue of an order under s 426(3) or otherwise, the submission of that claim to the court exercising jurisdiction in relation to insolvency law in that other part is to be treated in the same manner as a request made by the court for the purpose of s 426(4) (see infra): s 426(6).

5 Ibid s 426(4). The English court is not bound to accede to a request for assistance from a foreign court, although any such request will always be given great weight: *Hughes v Hannover Rückversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497, [1997] BCC 921, CA. The English courts may not accede to a request for assistance from a foreign court when the assistance sought would, if granted, interfere with the conduct of insolvency proceedings in England: *Re Focus Insurance Co Ltd* [1997] 1 BCLC 219, [1996] BCC 659.

For these purposes, 'relevant country or territory' means any of the Channel Islands or the Isle of Man, or any country or territory designated for the purposes of this provision by the Secretary of State by order made by statutory instrument: Insolvency Act 1986 s 426(11). The following countries and territories are designated for these purposes: Anguilla, Australia, The Bahamas, Bermuda, Botswana, Brunei Darussalam, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic of Ireland, Malaysia, Montserrat, New Zealand, Republic of South Africa, St Helena, Turks and Caicos Islands, Tuvalu, Virgin Islands: Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, SI 1986/2123, art 2, Schedule; Co-

operation of Insolvency Courts (Designation of Relevant Countries) Order 1996, SI 1996/253, art 2, Schedule; Co-operation of Insolvency Courts (Designation of Relevant Country Order) 1998, SI 1998/2766, art 2.

The Insolvency Act 1986 s 426(4), (5), (10), (11) (as amended) extends to the Bailiwick of Guernsey with certain modifications: see the Insolvency Act 1986 (Guernsey) Order 1989, SI 1989/2409; and para 2 ante.

6 Insolvency Act 1986 s 426(5). When faced with a request from a foreign court for assistance, the English is entitled to apply either English law or the law of the requesting court in determining whether to grant the request for assistance; and, once the English court has chosen to apply foreign law, it must direct itself by reference to that law: *England v Smith* [2001] Ch 419, [2000] 2 WLR 1141, CA.

Where a company is involved in insolvency proceedings abroad, it has been said that the English courts will do their utmost to co-operate with those proceedings and to avoid any action which might disturb the orderly administration of those proceedings: *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112; cf *Felixstowe Dock and Rly Co v United States Lines Inc* [1989] QB 360, [1988] 2 All ER 77.

See also *Re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621, [1992] BCC 394 (English court has jurisdiction to make administration order in relation to a foreign company pursuant to a request made under the Insolvency Act 1986 s 426 (as amended)); *Re Bank of Credit and Commerce International SA (No 9)*, *Re Bank of Credit and Commerce International (Overseas) Ltd* [1994] 3 All ER 764, [1994] 2 BCLC 636 (freezing order granted in support of foreign insolvency proceedings).

As regards recognition by the English court of foreign bankruptcies outside the ambit of the Insolvency Act 1986 s 426 (as amended):

- 76 (1) the English courts will recognise that the courts of a foreign state have jurisdiction over a debtor if he was domiciled in that state at the time of the presentation of the petition (*Re Blithman* (1866) LR 2 Eq 23) or if he submitted to the jurisdiction of its courts (*Re Davidson's Settlement Trusts* (1873) LR 15 Eq 383; *Re Anderson* [1911] 1 KB 896; *Bergerem v Marsh* [1921] B & CR 195);
- 77 (2) the vesting of the bankrupt's movable property in his foreign trustee will be given effect by the English courts (*Re Blithman* supra; *Alivon v Furnival* (1834) 1 Cr M & R 277) subject to any existing adverse rights against such property which would be recognised by the English courts (*Galbraith v Grimshaw* [1910] AC 508, HL; *Levasseur v Mason & Barry Ltd* [1891] 2 QB 73, CA); as regards immovable property situated in England and Wales, the English courts, while not recognising the vesting of title in the foreign trustee, may assist him by appointing a receiver over such property with the power to sell and deal with the proceeds (*Re Kooperman* [1928] B & CR 49; *Re Osborn, ex p Trustee* [1931-32] B & CR 189).

7 The Criminal Law Act 1977 s 38. Section 38 was repealed by the Criminal Justice and Public Order Act 1994 s 168(3), Sch 11.

8 Insolvency Act 1986 s 426(7). Without prejudice to any power to make rules of court, any power to make provision by subordinate legislation for the purpose of giving effect in relation to individuals to the insolvency law of any part of the United Kingdom includes the power to make provision for the purpose of giving effect in that part to any provision made by or under the provisions contained in s 426(1)-(7): s 426(8). For the meaning of 'subordinate legislation' see para 2 note 7 ante.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 728 Co-operation between courts exercising jurisdiction in relation to insolvency

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



NOTE 1--The Companies Act 1989 s 183(3) (amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929; and the Civil Jurisdiction and Judgments Regulations 2007, SI 2007/1655) refers also to a judgment required to be recognised or enforced under or by virtue of EC Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as applied by the Agreement made on 19 October 2005 between the European Community and the Kingdom of Denmark.

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### **729. Model law on cross-border insolvency.**

The Secretary of State may by regulations make any provision which he considers necessary or expedient for the purpose of giving effect, with or without modifications, to the model law on cross-border insolvency<sup>1</sup>.

In particular, regulations may:

- 963 (1) apply any provision of insolvency law<sup>2</sup> in relation to foreign proceedings<sup>3</sup>, whether begun before or after the regulations come into force;
- 964 (2) modify the application of insolvency law, whether in relation to foreign proceedings or otherwise;
- 965 (3) amend any of the statutory provisions relating to co-operation between courts,

and may apply or, as the case may be, modify the application of insolvency law in relation to the Crown<sup>4</sup>.

The regulations may make different provision for different purposes and may make any supplementary, incidental or consequential provision, or any transitory, transitional or saving provision, which the Secretary of State considers necessary or expedient<sup>5</sup>.

1 Insolvency Act 2000 s 14(1). Regulations under s 14 are to be made by statutory instrument and may only be made if a draft has been laid before and approved by resolution of each House of Parliament: s 14(5). The making of regulations under s 14 requires the agreement: (1) if they extend to England and Wales, of the Lord Chancellor; and (2) if they extend to Scotland, of the Scottish Ministers: s 14(6). For these purposes, 'the model law on cross-border insolvency' means the model law contained in Annex I of the report of the thirtieth session of the United Nations Commission on International Trade Law: Insolvency Act 2000 s 14(4). At the date at which this volume states the law no such regulations had been made.

2 For these purposes, 'insolvency law' has the same meaning as in the Insolvency Act 1986 s 426(10)(a), (b) (as amended) (see para 728 note 1 ante): Insolvency Act 2000 s 14(4).

3 For these purposes, 'foreign proceedings' has the same meaning as in the model law on cross-border insolvency: *ibid* s 14(4).

4 *Ibid* s 14(2).

5 *Ibid* s 14(3).

### **UPDATE**

## **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **729 Model law on cross-border insolvency**

TEXT AND NOTES--Regulations have been made providing for the UNCITRAL Model Law to have the force of law: see the Cross-Border Insolvency Regulations 2006, SI 2006/1030 (amended by SI 2009/1941). Nothing in the Insolvency Act 1986 s 388 (see PARA 43) applies to anything done by a foreign representative under or by virtue of SI 2006/1030: reg 8.

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### **(iii) Stay and Transfer of Proceedings**

#### **730. Stay of proceedings; remedies against bankrupt.**

At any time when proceedings on a bankruptcy petition are pending or an individual has been adjudged bankrupt, the court<sup>1</sup> may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt<sup>2</sup>. Any court in which proceedings are pending against any individual may, on proof that a bankruptcy petition has been presented in respect of that individual or that he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit<sup>3</sup>.

After the making of a bankruptcy order, no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy:

- 966 (1) has any remedy against the property<sup>4</sup> or person of the bankrupt in respect of that debt; or
- 967 (2) may, before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the permission of the court and on such terms as the court may impose<sup>5</sup>.

The court may, in advance of the hearing of an application to annul a bankruptcy order, make an interim order staying any proceedings which it thinks ought, in the circumstances of the application, to be stayed<sup>6</sup>.

<sup>1</sup> ie the court having jurisdiction in bankruptcy to which bankruptcy proceedings have been allocated (see para 6 ante) or transferred (see para 734 post): see the Insolvency Act 1986 s 385(1); and para 6 note 8 ante.

As to the application of s 385 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 6 note 8 ante.

<sup>2</sup> Ibid s 285(1). As to the application of s 285 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 218 note 1 ante.

This is no distinction between coercive and punitive proceedings; and the court has power under s 285(1) to make an order staying either type of proceedings: *Smith (a bankrupt) v Braintree District Council* [1990] 2 AC 215, [1989] 3 All ER 897, HL (court made order staying proceedings for the recovery of rates including committal proceedings), overruling *Re Edgcome, ex p Edgcome* [1902] 2 KB 403, CA.

The enforcement by a landlord of his right of peaceable re-entry into leasehold premises on the grounds of arrears of rent does not constitute the enforcement of security or a remedy against the property or the debtor: *Razzaq v Pala* [1997] 1 WLR 1336, [1997] BPIR 726; cf *Exchange Travel Agency Ltd v Triton Property Trust plc* [1991] BCLC 396, [1991] BCC 341.

3 Insolvency Act 1986 s 285(2). The court may refuse to stay proceedings on terms that all interlocutory applications are to be heard in private and that information and documents acquired in the course of the proceedings are not to be disclosed to third parties: *Polly Peck International plc v Nadir* [1992] BCLC 746. See also *Re Davies (a bankrupt)* [1997] BPIR 619.

4 References in the Insolvency Act 1986 s 285 to property of the bankrupt are to any of his property, whether or not comprised in his estate: s 285(6).

5 Ibid s 285(3). As to debts provable in a bankruptcy see the Insolvency Rules 1986, SI 1986/1925 r 12.3 (as amended); and para 491 ante. It follows from the fact that any obligation arising under an order made in family proceedings is not provable in a bankruptcy that the order may be enforced against the bankrupt: *Woodley v Woodley (No 2)* [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA. See also *Re X (a bankrupt)* [1996] BPIR 494.

The Insolvency Act 1986 s 285(3) is subject to s 346 (enforcement procedures: see para 678 et seq ante) and s 347 (limited right of distress: see para 686 et seq ante): s 285(3). Subject to s 285(5), (6), s 285(3) does not affect the right of a secured creditor of the bankrupt to enforce his security: s 285(4). See further para 218 ante.

6 See the Insolvency Rules 1986, SI 1986/1925, r 6.208(1); and para 617 ante.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### 731. Application for stay of or permission to commence proceedings.

An application to stay proceedings against the property or person of the debtor or, as the case may be, the bankrupt made to the court in which the bankruptcy proceedings are pending must be made by ordinary application<sup>1</sup>. Such an application must be made in the pending proceedings, as may be appropriate<sup>2</sup>. The jurisdiction to stay is discretionary<sup>3</sup>; and in its exercise regard must be had to the primary purpose of bankruptcy, namely the collection of all the assets comprised in the bankrupt's estate, and their distribution *pari passu* among the bankrupt's creditors after payment of the preferential debts<sup>4</sup>.

An application to commence proceedings against the bankrupt after the making of a bankruptcy order must be made by ordinary application to the court in which the bankruptcy proceedings are pending<sup>5</sup>.

1 See para 765 post.

2 See CIVIL PROCEDURE.

3 See *Re Manning, ex p Mills* (1871) 6 Ch App 594; *Re Boustead, ex p Rogers* (1881) 16 ChD 665. In *Re Hutton (a bankrupt), Mediterranean Machine Operations Ltd v Haigh* [1969] 2 Ch 201, [1969] 1 All ER 936, Goff J defined the practice of the bankruptcy court under the Bankruptcy Act 1914 (repealed) as leaving to the ordinary tribunals the determination of cases where no points of bankruptcy law were involved, unless the court's own authority, or the necessary protection of its officers, was in issue.

4 *Re Commercial Bank Corpn of India and the East, Smith, Fleming & Co's Case, Gledstones & Co's Case* (1866) 1 Ch App 538 at 545. Under the Bankruptcy Act 1914 (repealed), after a receiving order was made, a pending action was normally stayed until a trustee was appointed or the receiving order rescinded or discharged: *Franco v Dutton* [1923] WN 40; and see *Hatton v Denison* [1926] WN 80. The court must not restrain any proceedings for a claim from which discharge from bankruptcy would not release the bankrupt: *Re Blake, ex p Coker* (1875) 10 Ch App 652.

5 See para 765 post. The application should be served on the trustee: see *Western and Brazilian Telegraph Co v Bibby* (1880) 42 LT 821.

Proceedings commenced against a bankrupt after the making of a bankruptcy order without the permission of the court are not null and void for all purposes and are capable of being validated by retrospective permission being granted: *Re Saunders (a bankrupt), Re Bearman (a bankrupt)* [1997] Ch 60, [1997] 3 All ER 992. In considering whether to grant retrospective permission, the court will consider whether the claim would be better resolved by proceedings than by submission of a proof of debt: *Bristol & West Building Society v Trustee of the property of Back (a bankrupt)* [1998] 1 BCLC 485, sub nom *Bristol & West Building Society v Trustee of the property of Back (a bankrupt) and Melinek (a bankrupt)* [1997] BCC 358. The court need not investigate the merits of the claim, provided that it is satisfied that it is not clearly unsustainable: *Bristol & West Building Society v Trustee of the property of Back (a bankrupt)* supra.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/ (iii) Stay and Transfer of Proceedings/732. Stay or dismissal of bankruptcy proceedings.

### 732. Stay or dismissal of bankruptcy proceedings.

If it appears to the court appropriate to do so on the grounds that there has been a contravention of the Insolvency Rules 1986<sup>1</sup> or for any other reason, the court has a general power to dismiss a bankruptcy petition or to stay proceedings on such a petition; and, where it stays proceedings on a petition, it may do so on such terms and conditions as it thinks fit<sup>2</sup>.

1 Ie the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 Insolvency Act 1986 s 266(3). As to the application of s 266 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 124 note 11 ante.

Where a petition is presented in respect of a judgment and a bona fide serious appeal is pending in respect of the judgment which was being taken seriously by the debtor and has been prosecuted with diligence, bankruptcy proceedings will ordinarily be stayed and the hearing of the petition adjourned: *Re Yeatman, ex p Yeatman* (1880) 16 ChD 283, CA; *Re Noble (a bankrupt), ex p Bankrupt v Official Receiver* [1965] Ch 129,

[1964] 2 All ER 522, CA; *Re A Debtor (No 799 of 1994)*, *ex p Cobbs Property Services Ltd* [1995] 3 All ER 723, [1995] 1 WLR 467. In relation to the power of the court on the hearing of a petition to stay or dismiss the petition on the grounds that an appeal is pending from the judgment or order on which the petition is based see further the Insolvency Rules 1986, SI 1986/1925, r 6.25(2); and para 196 ante.

The court may also stay or dismiss a petition on the grounds of want of prosecution (*TSB Bank plc v Platts* [1997] BPIR 151) or on grounds that there is a prior foreign bankruptcy in respect of the debtor or that the debtor has no assets in the jurisdiction (*Re Thulin* [1995] 1 WLR 165). In relation to the court's powers to stay a petition presented for the purpose of preventing a debtor from proceeding with an action see *Re Ross (a bankrupt)* (No 2) [2000] BPIR 636, CA. See further para 124 ante.

The power of the court to stay proceedings is discretionary and the registrar's decision will not be upset on appeal unless he has clearly exercised his discretion wrongly: *Re French, ex p French* (1889) 6 Morr 258, CA (a decision under the Bankruptcy Act 1914 (repealed)).

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### 733. Stay of advertisement of bankruptcy order.

On the application<sup>1</sup> of the bankrupt or a creditor, the court may order the official receiver not to send notice of the making of a bankruptcy order to the Chief Land Registrar, for registration in the register of writs and orders affecting land, not to cause the order to be advertised in such local paper as the official receiver thinks fit, or not to cause notice of the order to be gazetted, pending a further order of the court<sup>2</sup>.

<sup>1</sup> As to the mode of application and the procedure see para 764 et seq post.

<sup>2</sup> See the Insolvency Rules 1986, SI 1986/1925, r 6.46(3); and para 204 ante. An application for such an order must be supported by an affidavit stating the grounds on which it is made: r 6.46(3). As to the use of witness statements instead of affidavits in insolvency proceedings see r 7.57(5), (6) (as substituted); and para 793 post.

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### 733 Stay of advertisement of bankruptcy order

NOTE 2--SI 1986/1925 r 6.46(3) amended: SI 2005/527.

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General power of transfer.

### **734. General power of transfer.**

The High Court and the county courts have jurisdiction throughout England and Wales for the purposes<sup>1</sup> of individual insolvency<sup>2</sup>. In addition to its ordinary jurisdiction, a county court has all the powers and jurisdiction of the High Court<sup>3</sup>. Jurisdiction is so exercised by the High Court in relation to proceedings which are allocated to the London insolvency district<sup>4</sup>, and by each county court in relation to the proceedings which are allocated to the insolvency district<sup>5</sup> of that court<sup>6</sup>. Such jurisdiction is without prejudice to the transfer of proceedings from one court to another; and nothing in the above provisions invalidates any proceedings on the grounds that they were initiated or continued in the wrong court<sup>7</sup>.

Where bankruptcy proceedings are pending in the High Court, the court may order them to be transferred to a specified county court<sup>8</sup>; and, where bankruptcy proceedings are pending in a county court, the court may order them to be transferred either to the High Court or to another county court<sup>9</sup>. In any case where proceedings are transferred to a county court, the transfer must be to a court which has jurisdiction in bankruptcy<sup>10</sup>.

Where bankruptcy proceedings are pending in a county court, a judge of the High Court may order them to be transferred to that Court<sup>11</sup>.

A transfer of proceedings may be so ordered by the court of its own motion, or on the application of the official receiver, or on the application of a person appearing to the court to have an interest in the proceedings<sup>12</sup>; and a transfer of proceedings may be ordered, notwithstanding that the proceedings commenced before 29 December 1986<sup>13</sup>.

On a transfer the whole of the relevant bankruptcy proceedings are transferred<sup>14</sup>.

1    Ie for the purposes of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

2    Ibid s 373(1). As to the application of s 373 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 6 note 2 ante.

3    Ibid s 373(2).

4    As to the London insolvency district see para 7 note 1 ante.

5    As to insolvency districts outside the London insolvency district see para 7 ante.

6    Insolvency Act 1986 s 373(3).

7    Ibid s 373(4).

8    Insolvency Rules 1986, SI 1986/1925, r 7.11(1).

9    Ibid r 7.11(2); and see *Re Marquis of Huntly, ex p Goldstein* [1917] 2 KB 729, DC; *Re Crossley (a debtor)* [1954] 3 All ER 296, [1954] 1 WLR 1353. In corporate insolvency where two different petitioners present petitions, one in the High Court and one in a county court, and the county court petition is due for virtually immediately hearing, the proceedings should continue as to both petitions, with the High Court to resolve the matter, being informed by affidavit of the facts relating to the county court petition: *Re Filby Bros (Provender) Ltd* [1958] 2 All ER 458, [1958] 1 WLR 683. In *Re Audio Systems Ltd* [1965] 2 All ER 919, [1965] 1 WLR 1096, the High Court petition was due for hearing one month before the county court petition. Pennycuik J made a compulsory order on the High Court petition and transferred the county court petition to the High Court.

In circumstances where an office-holder holds multiple appointments as trustee in bankruptcy proceedings some of which are in the High Court and some of which are in county courts and it is desired to replace the office-holder, a composite application can be made to the High Court which has jurisdiction to transfer the proceedings from the county courts for the purpose of making an order to replace the office-holder as trustee: see *Supperstone v Auger* [1999] BPIR 152; and para 80 ante.

10 Insolvency Rules 1986, SI 1986/1925, r 7.11(3); and see *Re Real Estates Co* [1893] 1 Ch 398.

11 Insolvency Rules 1986, SI 1986/1925, r 7.11(4).

12 *Ibid* r 7.11(5). As to a person 'having an interest' see para 348 note 2 ante.

13 *Ibid* r 7.11(6). The Insolvency Rules 1986, SI 1986/1925 (as amended) came into force on 29 December 1986: r 0.1. As to the mode of application and the procedure see para 764 et seq post.

In ordering a transfer, the court takes into account the balance of convenience: see *Re Linton* (1892) 8 TLR 219; on appeal 8 TLR 377, CA. The applicant may be ordered, as a condition of transfer, to give an undertaking to pay the debtor's travelling expenses as and when he may be required to attend the court or the trustee. An appeal may be brought from a refusal to transfer where the judge has refused to exercise his discretion: *Re Walker, ex p Soanes* (1884) 13 QBD 484, DC.

14 *Re Kouyoumdjian (a bankrupt), ex p Trustee of the Property of the Bankrupt v Lord* [1956] 2 All ER 286, [1956] 1 WLR 558; *Re A Debtor (No 26A of 1975)* [1984] 3 All ER 995, [1985] 1 WLR 6.

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### 734 General power of transfer

TEXT AND NOTES 8-10--SI 1986/1925 r 7.11(1)-(3) amended, r 7.11(3A) added: SI 2009/642.

TEXT AND NOTE 11--SI 1986/1925 r 7.11(4) amended: SI 2009/642.

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### 735. Application for transfer.

An application by the official receiver for proceedings to be transferred must be made with a report by him setting out the reasons for the transfer, and including a statement either that the petitioner consents to the transfer or that he has been given at least 14 days' notice of the official receiver's application<sup>1</sup>. If the court is satisfied from the official receiver's report that the proceedings can be conducted more conveniently in another court, the proceedings must be transferred to that court<sup>2</sup>.

Where an application for the transfer of proceedings is made otherwise than by the official receiver, at least 14 days' notice of the application must be given by the applicant to the official receiver attached to the court<sup>3</sup> in which the proceedings are pending, and to the official receiver attached to the court to which it is proposed that they should be transferred<sup>4</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 7.13(1). Notice of the application should be served on the debtor: *Re Yapp, ex p Trustee* (1886) 55 LT 719. As to the general power of transfer see para 734 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.13(2).

3 As to the attachment of the official receiver to particular courts see para 31 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 7.13(3).

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### **735 Application for transfer**

TEXT AND NOTE 1--SI 1986/1925 r 7.13(1) amended: SI 2009/642.

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### **736. Proceedings commenced in wrong court.**

Where bankruptcy proceedings are commenced in a court which is, in relation to those proceedings, the wrong court, that court may order the transfer of the proceedings to the court in which they ought to have been commenced, may order that the proceedings be continued in the court in which they have been commenced, or order the proceedings to be struck out<sup>1</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 7.12. As to the jurisdiction of the High Court and county courts see paras 6, 7 ante; and as to the general power of transfer see para 734 ante.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

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### **736 Proceedings commenced in wrong court**

TEXT AND NOTES--SI 1986/1925 r 7.12 amended: SI 2009/642.



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### **737. Proceedings following order for transfer.**

The court making an order for the transfer of bankruptcy proceedings<sup>1</sup> must forthwith send to the transferee court a sealed copy of the order, and the file of the proceedings<sup>2</sup>. On receipt of these, the transferee court must forthwith send notice of the transfer to the official receivers attached to that court and the transferor court respectively<sup>3</sup>.

Where, however, the order is made by the High Court transferring bankruptcy proceedings to that Court from a county court<sup>4</sup>, the High Court must send sealed copies of the order to the county court from which the proceedings are to be transferred, and to the official receivers attached to that court and the High Court respectively; and that county court must send the file of the proceedings to the High Court<sup>5</sup>.

Following compliance with the above provisions, if the official receiver attached to the court to which the proceedings are ordered to be transferred is not already the official receiver in relation to those proceedings<sup>6</sup>, he becomes, in relation to those proceedings, the official receiver in place of the official receiver attached to the other court concerned<sup>7</sup>.

1    Ie under the Insolvency Rules 1986, SI 1986/1925, r 7.11: see para 734 ante.

2    Ibid r 7.14(1).

3    Ibid r 7.14(2).

4    Ie under ibid r 7.11(4): see para 734 ante.

5    Ibid r 7.14(3).

6    Ie by virtue of directions given by the Secretary of State under the Insolvency Act 1986 s 399(6)(a): see para 31 head (1) ante.

7    Insolvency Rules 1986, SI 1986/1925, r 7.14(4).

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### **738. Transfer of other proceedings.**

Where a bankruptcy order has been made in the case of an individual by the High Court<sup>1</sup> or an interim receiver has been appointed<sup>2</sup>, or bankruptcy proceedings have been transferred to that Court from a county court<sup>3</sup>, a judge of any Division of the High Court may, of his own motion, order the transfer to that Division of any such proceedings as are mentioned below and are pending against the individual concerned ('the insolvent') either in another Division of the High Court or in a court in England and Wales other than the High Court<sup>4</sup>.

Proceedings which may be so transferred are those brought by or against the insolvent for the purpose of enforcing a claim against the insolvent estate<sup>5</sup>, or brought by a person other than the insolvent for the purpose of enforcing any such claim, including proceedings of any description by a mortgagee<sup>6</sup>.

Where proceedings are transferred under the above provisions, the registrar may, subject to general or special directions of the judge, dispose of any matter arising in the proceedings which would, but for the transfer, have been disposed of in chambers or, in the case of proceedings transferred from a county court, by the district judge of that court<sup>7</sup>.

1 See para 203 ante.

2 See para 225 ante.

3 See para 734 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 7.15(1), (2).

5 For the meaning of 'the insolvent estate' see para 91 note 18 ante. As to restrictions on proceedings and remedies see the Insolvency Act 1986 s 285; and paras 218 ante, 758 post.

6 Insolvency Rules 1986, SI 1986/1925, r 7.15(3). As to the position of secured creditors in the bankruptcy, including mortgagees, see para 560 et seq ante; and as to application to the court by a mortgagee for an order for sale see para 415 ante.

7 Ibid r 7.15(4); Courts and Legal Services Act 1990 s 74(1)(a).

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## (iv) Appeals and Reviews of Court Orders

### 739. Appeals and reviews of court orders; in general.

Every court having jurisdiction under the Insolvency Act 1986 in bankruptcy proceedings<sup>1</sup> may review, rescind or vary any order made by it in the exercise of that jurisdiction<sup>2</sup>. An appeal from a decision made in the exercise of that jurisdiction by a county court or by a registrar in

bankruptcy of the High Court lies to a single judge of the High Court; and an appeal from a decision of that judge on such an appeal lies to the Court of Appeal<sup>3</sup>.

A county court is not, in the exercise of its jurisdiction in bankruptcy proceedings, subject to be restrained by the order of any other court; and no appeal lies from its decision in the exercise of that jurisdiction except as is mentioned above<sup>4</sup>.

1 le for the purposes of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended). As to the courts having such jurisdiction see paras 6, 7 ante.

2 Ibid s 375(1). The jurisdiction to review a consent order will only be exercised in an exceptional case where there is serious injustice: *Boorer v Trustee in Bankruptcy of Boorer* [2002] BPIR 21. It is not proper to use the jurisdiction to review under the Insolvency Act 1986 s 375 (as amended) to circumvent the prohibition in s 255(1)(c) (see para 86 head (3) ante) against second applications for an interim order within a 12-month period: *Hurst v Bennett (No 2)* [2002] BPIR 102.

The jurisdiction to rehear is unlimited; but, where a decision has been made by a judge after full argument, another judge of co-ordinate jurisdiction presented with the same material on an application to review should substitute his decision only in the most exceptional of circumstances: *Mond v Hammonds Suddards (a firm)* [1999] 3 WLR 697, sub nom *Re RS & M Engineering Ltd, Mond v Hammonds Suddards (a firm) (No 2)* [1999] 2 BCLC 485, CA. In relation to winding-up proceedings see also the Insolvency Rules 1986, SI 1986/1925, r 7.47(1); *Re Thirty-Eight Building Ltd (in liquidation) (No 2)*, *Simms v Saunders* [2000] 1 BCLC 201, sub nom *Re Thirty-Eight Building Ltd* [2000] BCC 422; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1030.

It appears that a judge of the High Court has jurisdiction to hear an application to review a decision of a registrar: *O'Brien v IRC* [2000] BPIR 306. See also *Re Piccadilly Property Management* [1999] 2 BCLC 145, [1999] BPIR 260; but cf *Re SN Group plc* [1994] 1 BCLC 319, [1993] BCC 808 (both decisions made in relation to the Insolvency Rules 1986, SI 1986/1925, r 7.47(1)).

The court also has jurisdiction under the Insolvency Act 1986 s 375(1) to rescind a bankruptcy order: *Fitch v Official Receiver* [1996] 1 WLR 242, [1996] BCC 328, CA (bankruptcy order rescinded on application of bankrupt where creditors had changed their mind as to the desirability of an order being made).

As to the application of the Insolvency Act 1986 s 375 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 452 note 4 ante.

3 Ibid s 375(2) (amended by the Access to Justice Act 1999 s 106, Sch 15 Pt III); Insolvency Rules 1986, SI 1986/1925, r 7.48(2). See further paras 741-746 post. As to procedure on appeals in bankruptcy proceedings see *Practice Direction-Insolvency Proceedings* Pt 4 (para 17); and para 741 et seq post.

4 Insolvency Act 1986 s 375(3).

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### 739 Appeals and reviews of court orders; in general

NOTE 2--*Fitch*, cited, applied: *Papanicola v Humphreys* [2005] EWHC 335 (Ch), [2005] 2 All ER 418.

PROCEDURE IN INSOLVENCY PROCEEDINGS/(iv) Appeals and Reviews of Court Orders/740.  
Appeal by Secretary of State.

#### **740. Appeal by Secretary of State.**

In bankruptcy proceedings, an appeal lies at the instance of the Secretary of State from any order of the court made on an application for the rescission or annulment of a bankruptcy order, or for a bankrupt's discharge<sup>1</sup>.

<sup>1</sup> Insolvency Rules 1986, SI 1986/1925, r 7.48(1). As to annulment of bankruptcy orders see para 610 et seq ante; and as to discharge from bankruptcy see para 629 et seq ante.

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Procedure on appeals; in general.

#### **741. Procedure on appeals; in general.**

Subject to the following provisions, the procedure and practice of the Supreme Court relating to appeals to the Court of Appeal<sup>1</sup> apply to appeals in insolvency proceedings<sup>2</sup>. In insolvency proceedings the procedure relating to appeals to the Court of Appeal<sup>3</sup> is by ordinary application<sup>4</sup> and not by application notice<sup>5</sup>.

The procedure governing appeals in insolvency proceedings is governed by Practice Direction-Insolvency Proceedings<sup>6</sup>.

<sup>1</sup> Ie CPR Pt 52: see CIVIL PROCEDURE vol 12 (2009) PARA 1657 et seq.

<sup>2</sup> Insolvency Rules 1986, SI 1986/1925, r 7.49(1) (substituted by SI 1999/1022). For the meaning of 'insolvency proceedings' see para 35 note 4 ante. In relation to any appeal to a single judge of the High Court under the Insolvency Act 1986 s 375(2) (as amended) (see para 742 post), any reference in the Civil Procedure Rules 1998, SI 1998/3132 (as amended) to the Court of Appeal is replaced by a reference to that judge; and any reference to the Registrar of Civil Appeals is replaced by a reference to the registrar of the High Court who deals with insolvency proceedings of the kind involved: Insolvency Rules 1986, SI 1986/1925, r 7.49(2) (substituted by SI 1999/1022).

<sup>3</sup> Ie under CPR Pt 52.

<sup>4</sup> As to the form and contents of such application see para 766 post.

<sup>5</sup> Insolvency Rules 1986, SI 1986/1925, r 7.49(3) (substituted by SI 1999/1022).

<sup>6</sup> *Practice Direction-Insolvency Proceedings* Pt 4 (para 17) (see para 742 et seq post) governing appeals in insolvency proceedings came into effect on 2 May 2000: para 17.1.

Where under the procedure relating to appeals in insolvency proceedings prior to the coming into effect of *Practice Direction-Insolvency Proceedings* an appeal has been set down in the High Court or permission to appeal to the Court of Appeal has been granted before 2 May 2000, the procedure and practice set out in *Practice Direction-Insolvency Proceedings* applies to the appeal after that date: para 17.24(1).

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#### **741 Procedure on appeals; in general**

TEXT AND NOTES--SI 1986/1925 r 7.49 substituted by r 7.49A: SI 2010/686.

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#### **742. Appeals to High Court judge.**

An appeal from a decision made by a county court<sup>1</sup> in a bankruptcy matter or by a registrar in bankruptcy of the High Court lies to a single judge of the High Court<sup>2</sup>. For the purposes of insolvency proceedings, such an appeal is termed a 'first appeal'<sup>3</sup>.

<sup>1</sup> Ie whether made by a district judge or a circuit judge.

<sup>2</sup> Insolvency Act 1986 s 375(2); Insolvency Rules 1986, SI 1986/1925, r 7.48(2); *Practice Direction-Insolvency Proceedings* para 17.2(1); and see para 739 ante. As to the application of the Insolvency Act 1986 s 375 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 452 note 4 ante.

An appeal from a decision of a registrar in bankruptcy must, or from any decision made in any county court may, be filed at the Royal Courts of Justice in London: *Practice Direction-Insolvency Proceedings* para 17.10(1). An appeal from a decision made in a county court exercising jurisdiction over an area within the Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester, Newcastle-upon-Tyne or Preston Chancery District Registries may be filed in the Chancery District Registry of the High Court appropriate to the area in which the decision was made: para 17.10(2).

<sup>3</sup> Ibid para 17.2(1). A first appeal does not include an appeal from a decision of a judge of the High Court: para 17.2(3).

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### **743. Procedure on first appeal.**

The procedure and practice for a first appeal<sup>1</sup> are governed by the normal rules<sup>2</sup> importing the procedure and practice of the Court of Appeal<sup>3</sup>. A first appeal does not require the permission of any court<sup>4</sup>.

The appellant must file the appellant's notice at the appeal court within such period as may be directed by the lower court or, where the court makes no such direction, 14 days after the decision of the lower court which the appellant wishes to appeal<sup>5</sup>. Unless the court orders otherwise, an appeal notice must be served by the appellant on each respondent as soon as practicable and, in any event, not later than seven days after it was filed<sup>6</sup>.

A respondent may file and serve a respondent's notice<sup>7</sup>. A respondent who wishes to ask the appeal court to uphold the order of the lower court for reasons different from, or additional to, those given by the lower court must file a respondent's notice<sup>8</sup>. A respondent's notice must be filed within such period as may be directed by the lower court or, where the court makes no such direction, 14 days after the date on which the respondent is served with the appellant's notice<sup>9</sup>. Unless the appeal court orders otherwise, a respondent's notice must be served by the respondent on the appellant and any other respondent as soon as practicable or, in any event, not later than seven days after it is filed<sup>9</sup>.

An appellant's notice and a respondent's notice must be in the prescribed form<sup>10</sup>. An appeal notice may not be amended without the permission of the appeal court<sup>11</sup>. A judge of the appeal court may strike out the whole or part of an appeal notice where there is a compelling reason for doing so<sup>12</sup>.

Unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of an order or decision of the lower court<sup>13</sup>.

Where an appellant does not wish to continue with the appeal or where the appeal has been settled, the appeal may be disposed of on paper without a hearing<sup>14</sup>. It may be dismissed by consent but the appeal court will not make an order allowing the appeal unless it is satisfied that the decision of the lower court was wrong<sup>14</sup>.

<sup>1</sup> For the meaning of 'first appeal' see para 742 ante.

<sup>2</sup> I.e. the Insolvency Rules 1986, SI 1986/1925, r 7.49 (as substituted): see para 741 ante.

<sup>3</sup> *Practice Direction-Insolvency Proceedings* para 17.2(2). The procedure and practice of the Court of Appeal are governed by CPR Pt 52 and *Practice Direction-Appeals* (2001) PD 52 (see CIVIL PROCEDURE vol 12 (2009) PARA 1657 et seq), which are subject to the provisions of the Insolvency Act 1986, the Insolvency Rules 1986, SI 1986/1925 (as amended) and *Practice Direction-Insolvency Proceedings* (see CPR 52.1(4); and CIVIL PROCEDURE vol 12 (2009) PARA 1658); *Practice Direction-Insolvency Proceedings* para 17.2(2). CPR Pt 52, *Practice Direction-Appeals* (2001) PD 52 and its forms do not apply to first appeals; but *Practice Direction-Insolvency Proceedings* paras 17.8-17.23 apply only to first appeals: para 17.7. Only *Practice Direction-Appeals* (2001) PD 52 paras 5.12, 5.14-5.20 (inclusive) (see CIVIL PROCEDURE vol 12 (2009) PARA 1663) apply, with any necessary modifications, to first appeals: *Practice Direction-Insolvency Proceedings* para 17.23.

<sup>4</sup> *Ibid* para 17.6.

<sup>5</sup> *Ibid* para 17.11(2). On so filing an appellant's notice, the appellant must file: (1) two copies of the appeal notice for the use of the court, one of which must be stamped with the appropriate fee, and a number of additional copies equal to the number of persons who are to be served with it pursuant to para 17.22(4) (see note 6 infra); (2) a copy of the order under appeal; and (3) the estimate of time for the hearing: para 17.22(1)

(a)-(c). The documents may be lodged personally or by post at the appropriate venue listed in para 17.22(2)(a)-(i): para 17.22(2).

Where a party seeks an extension of time in which to file an appeal notice, it must be requested in the appeal notice and the appeal notice should state the reason for the delay and the steps taken prior to the application being made; the court will fix a date for the hearing of the application and notify the parties of the date and place of the hearing: paras 17.11(1), 17.13(1). The parties may not agree to extend any date or time limit set by *Practice Direction-Insolvency Proceedings* or by any order of the appeal court or the lower court: para 17.13(2). As to the old law on extension of time to appeal see *Re Noble (a bankrupt), ex p Bankrupt v Official Receiver* [1965] Ch 129, [1964] 2 All ER 522, CA; *Re Patel (a debtor)* [1986] 1 All ER 522, sub nom *Re Patel (a debtor), ex p Debtor v Dallamo* [1986] 1 WLR 221, DC; and as to the computation of time see the Insolvency Rules 1986, SI 1986/1925, r 12.9 (as substituted) and para 760 post.

6 *Practice Direction-Insolvency Proceedings* para 17.11(3). The appeal notice must be served on all parties to the proceedings in the lower court who are directly affected by the appeal; and this may include the official receiver or trustee in bankruptcy: para 17.22(4). The appeal notice must be served by the appellant or by the legal representative of the appellant and may be effected by any of the methods referred to in CPR 6.2 (see CIVIL PROCEDURE vol 11 (2009) PARA 139) or, with the permission of the court, an alternative method pursuant to CPR 6.8 (see CIVIL PROCEDURE vol 11 (2009) PARA 152): *Practice Direction-Insolvency Proceedings* para 17.22(5). Service of an appeal notice must be proved by a certificate of service in accordance with CPR 6.10 (see CIVIL PROCEDURE vol 11 (2009) PARA 154) which must be filed at the relevant venue listed in *Practice Direction-Insolvency Proceedings* para 17.22(2)(a)-(i) immediately after service: para 17.22(6).

7 Ibid para 17.12(1).

8 Ibid para 17.12(2).

9 Ibid para 17.12(3).

10 Ibid para 17.9. For the prescribed forms see para 17.9, Schedule, Form PDIP 1 (appellant's notice), Form PDIP 2 (respondent's notice). If the documents are correct and in order, the court at which the documents are filed will fix the appeal date and will also fix the place of hearing: para 17.22(3). That court will send letters to all the parties to the appeal informing them of the date and place of the hearing and indicating the time estimate given by the appellant: para 17.22(3). The parties will be invited to notify the court of any alternative or revised time estimates; and, in the absence of any such notification, the estimate of the appellant will be taken as agreed: para 17.22(3).

11 Ibid para 17.15.

12 Ibid para 17.16.

13 Ibid para 17.14. Where a judge of the High Court has made a bankruptcy order or dismissed an appeal against such an order and an application is made for a stay of proceedings pending appeal:

- 78 (1) the judge will not normally grant a stay of proceedings but will confine himself to a stay of advertisement of the proceedings;
- 79 (2) where the judge has granted permission to appeal, any stay of advertisement will normally be until the hearing of the appeal but on terms that the stay will determine without further order if an appellant's notice is not filed within the period prescribed by the rules;
- 80 (3) where the judge has refused permission to appeal, any stay of advertisement will normally be for a period not exceeding 28 days:

para 17.25. Application for any further stay of advertisement should be made to the Court of Appeal: para 17.25.

14 Ibid para 17.22(8). Any consent order signed by each party or letters of consent from each party must be lodged not later than 24 hours before the date fixed for the hearing of the appeal at the address of the appropriate venue as set out in para 17.22(2)(a)-(i) and will be dealt with by the judge of the appeal court: para 17.22(8). Attention is drawn to *Practice Direction-Costs* (2000) PD 44 para 4.4(4) regarding costs where an order is made by consent without attendance: *Practice Direction-Insolvency Proceedings* para 17.22(8).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 743 Procedure on first appeal

TEXT--In the first paragraph, substitute 'A first appeal requires the permission of a court.' for the last sentence.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(iv) Appeals and Reviews of Court Orders/744. Interim applications.

### 744. Interim applications.

The following applications must be made to a judge of the appeal court:

- 968 (1) for injunctions pending a substantive hearing of the appeal;
- 969 (2) for expedition or vacation of the hearing date of an appeal;
- 970 (3) for an order striking out the whole or part of an appeal notice<sup>1</sup>;
- 971 (4) for a final order<sup>2</sup> on paper<sup>3</sup>.

All other interim applications must be made to the Registrar of Appeals<sup>4</sup> in the first instance who may in his discretion either hear and determine it himself or refer it to the judge<sup>5</sup>. An appeal from a decision of a Registrar of Appeals lies to a judge of the appeal court and does not require the permission of either the Registrar or the judge<sup>6</sup>.

The procedure for interim applications is by way of ordinary application<sup>7</sup>.

1 le pursuant to *Practice Direction-Insolvency Proceedings* para 17.16: see para 743 ante.

2 le pursuant to *ibid* para 17.22(8): see para 743 ante.

3 *Ibid* para 17.19.

4 For these purposes, 'Registrar of Appeals' means, in relation to an appeal filed at the Royal Courts of Justice in London, a bankruptcy registrar and, in relation to an appeal filed in a District Registry, a district judge of the relevant District Registry: *ibid* para 17.8(b).

5 *Ibid* para 17.20(1). It appears that the appeal court no longer has power to order an appellant to give security for costs in relation to a first appeal since the appeal court has no such power under CPR Pt 52 (see CIVIL PROCEDURE vol 12 (2009) PARA 1657 et seq) and in any event no such power is included in those parts of the Civil Procedure Rules 1998, SI 1998/3132 (as amended) applying to appeals in insolvency proceedings: see *Practice Direction-Insolvency Proceedings* para 17.7 (cited in 743 note 3 ante); cf *Hocking v Walker* [1997] BPIR 93, CA.

6 *Practice Direction-Insolvency Proceedings* para 17.20(2).

7 *Ibid* para 17.21. For the prescribed form of ordinary application see the Insolvency Rules 1986, SI 1986/1925, r 12.7(1), (2), Sch 4, Form 7.2.

### UPDATE

### 725-816 Practice and procedure in insolvency proceedings



The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(iv) Appeals and Reviews of Court Orders/745. Hearing of first appeal.

#### **745. Hearing of first appeal.**

The appellant must file a bundle of documents in the appropriate form<sup>1</sup> not later than seven days before the date fixed for the hearing<sup>2</sup>. The appellant must also lodge a skeleton argument accompanied by a written chronology of events relevant to the appeal at least two clear days before the date fixed for the hearing<sup>3</sup>.

In relation to an appeal the appeal court has all the powers of the lower court<sup>4</sup>. The appeal court has power to:

- 972 (1) affirm, set aside or vary any order or judgment made or given by the lower court;
- 973 (2) refer any claim or issue for determination by the lower court;
- 974 (3) order a new trial or hearing;
- 975 (4) make a costs order<sup>5</sup>.

The appeal court may exercise its powers in relation to the whole or part of an order of the lower court<sup>6</sup>.

Every appeal must be limited to a review of the decision of the lower court<sup>7</sup>. Unless it orders otherwise, the appeal court will not receive oral evidence or evidence which was not before the lower court<sup>8</sup>. The appeal court will allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court<sup>9</sup>. The appeal court may draw any inference of fact which it considers justified on the evidence<sup>10</sup>. At the hearing of the appeal a party may not rely on a matter not contained in his appeal notice unless the appeal court gives permission<sup>11</sup>.

1 The court will send to the appellant a document setting out the court's requirement concerning the form and content of the bundle of documents for the use of the judge: *Practice Direction-Insolvency Proceedings* para 17.22(3). The bundle should include an approved transcript of the judgment or, where there is no officially recorded judgment, the document(s) referred to in *Practice Direction-Appeals* (2001) PD52 para 5.12 (see CIVIL PROCEDURE VOL 12 (2009) PARA 1663): *Practice Direction-Insolvency Proceedings* para 17.22(3).

2 Ibid para 17.22(3). A copy must also be served by the appellant on each respondent: para 17.22(3).

3 Ibid para 17.22(7). Failure to do so may result in an adverse costs order being made by the judge on the hearing of the appeal: para 17.22(7).

4 Ibid para 17.17(1).

5 Ibid para 17.17(2).

6 Ibid para 17.17(3).

7 Ibid para 17.18(1). See also *Re Gilmartin (a bankrupt), ex p Bankrupt v International Agency and Supply Ltd* [1989] 2 All ER 835, [1989] 1 WLR 513.

8 *Practice Direction-Insolvency Proceedings* para 17.18(2). Therefore, the rule in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA as to the admission of new evidence on the hearing of an appeal does not apply to appeals in insolvency proceedings: cf *Lombard Natwest Factors Ltd v Arbis* [2000] BPIR 79 (decided before *Practice Direction-Insolvency Proceedings* para 17 came into force). However, a statutory demand is not an 'insolvency proceeding' within the meaning of the Insolvency Rules 1986, SI 1986/1925 r 13.7 (see para 35 note 4 ante): *Re A Debtor (No 1 of 1987, Lancaster), ex p Debtor v Royal Bank of Scotland plc* [1989] 2 All ER 46, sub nom *Re a Debtor (No 1 of 1987)* [1989] 1 WLR 271, CA. Accordingly, the procedure on an appeal from a decision on an application to set aside a statutory demand is not governed by *Practice Direction-Insolvency Proceedings* and the existing practice and procedure applies. In relation to the admissibility of new evidence on such an appeal see CPR r 52.11(2); and CIVIL PROCEDURE vol 12 (2009) PARA 1672. In the case of an appeal from a decision on an application to set aside a statutory demand it appears that the rule in *Ladd v Marshall* supra does not apply: *Re a Debtor (No SD 8/9 of 1998)* [2000] BCC 36, sub nom *Salvidge v Hussein* [1999] BPIR 410; *Purvis v Customs and Excise Comrs* [1999] BPIR 396; *Re a Debtor (No 223 SD of 1995), Norman Laurier v United Overseas Bank Ltd* [1996] BPIR 635. See also *Royal Bank of Scotland v Binnell* [1996] BPIR 352; but cf *Re A Debtor (No 59 of 1987)* (1988) Independent, 1 February; *AIB Finance Ltd v Debtors* [1997] 4 All ER 677, [1997] 2 BCLC 354 (affd on other grounds [1998] 2 All ER 929, [1998] 1 BCLC 665, CA).

9 *Practice Direction-Insolvency Proceedings* para 17.18(3).

10 Ibid para 17.18(4).

11 Ibid para 17.18(5).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(iv) Appeals and Reviews of Court Orders/746. Appeals from High Court judge.

#### 746. Appeals from High Court judge.

An appeal from a decision of a single judge of the High Court on a first appeal lies, with the permission of the Court of Appeal, to the Court of Appeal<sup>1</sup>. An appeal from a judge of the High Court, which is not a decision on a first appeal, lies, with the permission of the judge or of the Court of Appeal, to the Court of Appeal<sup>2</sup>. The procedure and practice of the Supreme Court relating to appeals to the Court of Appeal apply to appeals from a High Court judge in insolvency proceedings<sup>3</sup>.

No appeal lies from any order of the High Court or any other court or tribunal allowing an extension of time for appealing from a judgment or order<sup>4</sup>.

1 Insolvency Act 1986 s 375(2) (amended by the Access to Justice Act 1999 s 106, Sch 15 Pt III); Insolvency Rules 1986, SI 1986/1925, r 7.48(2); Access to Justice Act 1999 s 55; *Practice Direction-Insolvency Proceedings* paras 17.3(1), 17.5.

2 Insolvency Rules 1986, SI 1986/1925, r 7.49(1); CPR 52.3; *Practice Direction-Insolvency Proceedings* paras 17.3(2), 17.5. In insolvency proceedings, the procedure under CPR Pt 52 is by way of ordinary application and

not by application notice: Insolvency Rules 1986, SI 1986/1925, r 7.49(3) (substituted by SI 1999/1022). As to the mode of application and the procedure see para 764 et seq post.

3 Insolvency Rules 1986, SI 1986/1925, r 7.49(1) (substituted by SI 1999/1022); *Practice Direction-Insolvency Proceedings* paras 17.3(3), 17.4. For the meaning of 'insolvency proceedings' see para 35 note 4 ante. See also para 741 ante.

4 See the Supreme Court Act 1981 s 18(1)(b); and CIVIL PROCEDURE vol 12 (2009) PARA 1705.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 746 Appeals from High Court judge

TEXT AND NOTES--SI 1986/1925 r 7.49 substituted by r 7.49A: SI 2010/686.

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(iv) Appeals and Reviews of Court Orders/747. Appeal from official receiver.

### 747. Appeal from official receiver.

An appeal<sup>1</sup> against a decision of the official receiver must be brought within 28 days of the notification of the decision<sup>2</sup>. An appeal may be made against the official receiver's decision:

- 976 (1) as chairman of a meeting whether a proof should be admitted for the purposes of voting<sup>3</sup>;
- 977 (2) as trustee to reject a proof for the purposes of dividend, either in whole or in part<sup>4</sup>;
- 978 (3) refusing to release the bankrupt from his duty to submit a statement of affairs or to extend his time for submitting it<sup>5</sup>.

1 Ie under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 Ibid r 7.50.

3 Ie under ibid r 6.94: see para 289 ante.

4 Ie under ibid r 6.105: see para 537 ante.

5 Ie under the Insolvency Act 1986 s 288(3): see para 244 ante.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **747 Appeal from official receiver**

TEXT AND NOTES 1, 2--SI 1986/1925 r 7.50 now r 7.50(1), r 7.50(2) added: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(iv) Appeals and Reviews of Court Orders/748. Appeals from trustee.

### **748. Appeals from trustee.**

If a bankrupt or any of his creditors or any other person is dissatisfied<sup>1</sup> by any act, omission or decision of a trustee of the bankrupt's estate, he may apply<sup>2</sup> to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit<sup>3</sup>.

In particular, an appeal to the court is allowed from the trustee's decision, as chairman of the meeting, as to a creditor's or class of creditors' entitlement to vote<sup>4</sup>, and whether a proof should be admitted for the purposes of voting or rejected<sup>5</sup>, and from his decision as to the rejection or admission of a proof for the purpose of dividends<sup>6</sup>.

1 As to the meaning of 'person dissatisfied' see para 344 ante. Cf the Insolvency Act 1986 s 168(5) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1239) where, in corporate insolvency, it is an 'aggrieved' person who may apply to the court against a liquidator's decisions.

2 As to the mode of application and the procedure see para 764 et seq post.

3 See the Insolvency Act 1986 s 303(1); and para 344 ante.

4 Ie under the Insolvency Rules 1986, SI 1986/1925, r 6.93: see para 288 ante.

5 Ie under ibid r 6.94: see para 289 ante.

6 Ie under ibid r 6.105: see para 537 ante.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND

PROCEDURE IN INSOLVENCY PROCEEDINGS/(iv) Appeals and Reviews of Court Orders/749.  
Appeal from Secretary of State.

#### **749. Appeal from Secretary of State.**

There is no general right of appeal to the court from the decisions<sup>1</sup> of the Secretary of State; but a right of appeal is expressly given in the case of any person dissatisfied<sup>2</sup> with the decision of the Secretary of State in respect of a claim to undistributed assets forming part of the bankrupt's estate which have been paid into the Insolvency Services Account<sup>3</sup>.

Appeals must be made by application<sup>4</sup>. An appeal against a decision of the Secretary of State must be brought within 28 days of the notification of the decision<sup>5</sup>.

- 1 As to the decisions which the Secretary of State may make see para 23 ante.
- 2 As to the meaning of 'person dissatisfied' see para 344 ante.
- 3 See the Insolvency Regulations 1994, SI 1994/2507, reg 32(2); and para 389 ante.
- 4 As to the mode of application and the procedure see para 764 et seq post.
- 5 Insolvency Rules 1986, SI 1986/1925, r 7.50.

#### **UPDATE**

#### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **749 Appeal from Secretary of State**

TEXT AND NOTES 4, 5--SI 1986/1925 r 7.50 now r 7.50(1), r 7.50(2) added: SI 2003/1730.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(iv) Appeals and Reviews of Court Orders/750.  
Appeal from supervisor.

#### **750. Appeal from supervisor.**

If the debtor, any of his creditors or any other person is dissatisfied<sup>1</sup> by any act, omission or decision of the supervisor of a voluntary arrangement, he may apply<sup>2</sup> to the court; and the court may:

- 979 (1) confirm, reverse, or modify any act or decision of the supervisor;
- 980 (2) give him directions; or
- 981 (3) make such other order as it thinks fit<sup>3</sup>.

1 As to the meaning of 'person dissatisfied' see para 344 ante.

- 2 As to the mode of application and the procedure see para 764 et seq post.
- 3 See the Insolvency Act 1986 s 263(3); and para 110 ante.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(iv) Appeals and Reviews of Court Orders/751. Vexatious litigants.

#### **751. Vexatious litigants.**

A creditor of the bankrupt who has been prohibited from initiating proceedings in the High Court or in any other court without the permission of the High Court<sup>1</sup> may nevertheless prove his debt and, where the proof is rejected by the trustee in bankruptcy, may appeal to the appropriate bankruptcy court<sup>2</sup> against such rejection without first obtaining the permission of the court<sup>3</sup>.

1 The High Court has inherent jurisdiction to make an order for the purpose of preventing abuse of its procedures and may make an order restraining a person from initiating proceedings without the permission of the court where those proceedings would be vexatious: see the Supreme Court Act 1981 s 42 (amended by the Prosecution of Offences Act 1985 s 24(1)-(6)); and CIVIL PROCEDURE vol 11 (2009) PARAS 244, 258. Such an order may be made on an interim basis: *Ebert v Venvil*, *Ebert v Birch* [2000] Ch 484, [1999] 3 WLR 670, CA; and see CPR 25.1 and CIVIL PROCEDURE vol 11 (2009) PARA 315.

2 See para 6 ante.

3 *Re Wilson (a bankrupt), ex p Bebbington Easton* [1973] 1 All ER 849, [1973] 1 WLR 314.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **751 Vexatious litigants**

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND

PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/A. IN GENERAL/752. General control of the court.

## **(v) Miscellaneous Practice and Procedure**

### **A. IN GENERAL**

#### **752. General control of the court.**

Every bankruptcy is under the general control of the court<sup>1</sup>; and the court has full power<sup>2</sup> to decide all questions of priorities and all other questions, whether of law or fact, arising in any bankruptcy<sup>3</sup>. An undischarged bankrupt or a discharged bankrupt whose estate is still being administered<sup>4</sup> must<sup>5</sup> do all such things as he may be directed to do by the court for the purposes of his bankruptcy or, as the case may be, the administration of that estate<sup>6</sup>; and the official receiver or the trustee may at any time apply to the court for a direction under this provision<sup>7</sup>.

If any person without reasonable excuse fails to comply with any obligation so imposed on him, he is guilty of a contempt of court and liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>8</sup>.

1 For the meaning of 'the court' see para 764 post.

2 Ie subject to the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

3 Ibid s 363(1). As to the application of s 363 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 219 note 2 ante.

4 Ie under ibid Pt IX Ch IV (ss 305-335) (as amended).

5 Ie without prejudice to any other provision of ibid Pts VIII-XI (ss 252-385) (as amended).

6 Ibid s 363(2).

7 Ibid s 363(3). As to the mode of application and the procedure see para 764 et seq post.

8 Ibid s 363(4). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq; and as to offences see para 707 et seq ante. For the prescribed form of affidavit in support of an application for committal for contempt of court see the Insolvency Rules 1986, SI 1986/1925, rr 12.7(1), (2), Sch 4, Form 7.15 (substituted by SI 1991/495); and for the prescribed form of warrant of committal for contempt see the Insolvency Rules 1986, SI 1986/1925, Sch 4, Form 7.17.

### **UPDATE**

#### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **752 General control of the court**

NOTE 8--SI 1986/1925 Sch 4 Forms 7.15, 7.17 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/A. IN GENERAL/753. Rules and regulations; Insolvency Rules Committee.

### **753. Rules and regulations; Insolvency Rules Committee.**

As regards individual insolvency proceedings the practice is, for the most part, regulated by the Insolvency Rules 1986<sup>1</sup> which were made under statutory power<sup>2</sup>.

The Insolvency Rules Committee<sup>3</sup> continues to exist for the purposes of being consulted by the Lord Chancellor before he makes rules<sup>4</sup>. The committee must consist of:

- 982 (1) a judge of the High Court attached to the Chancery Division;
- 983 (2) a circuit judge;
- 984 (3) a registrar in bankruptcy of the High Court;
- 985 (4) the district judge of a county court;
- 986 (5) a practising barrister;
- 987 (6) a practising solicitor; and
- 988 (7) a practising accountant;

and the appointment of any person as a member of the committee must be made by the Lord Chancellor<sup>5</sup>.

The Lord Chancellor may appoint as additional members of the committee any person appearing to him to have qualifications or experience that would be of value to the committee in considering any matter with which it is concerned<sup>6</sup>; and he must consult the committee before making any rules<sup>7</sup>.

1 The Insolvency Rules 1986, SI 1986/1925 (as amended). See also the regulations referred to in para 2 note 5 ante; and *Practice Direction-Insolvency Proceedings*.

2 The power contained in the Insolvency Act 1986 s 412(1), which empowers the Lord Chancellor, with the concurrence of the Secretary of State, to make general rules, in relation to England and Wales, for the purpose of giving effect to the 1986 Act, so far as it relates to individual insolvency.

Without prejudice to the generality of s 412(1), or any provision of Pts VIII-XI (ss 252-385) (as amended) by virtue of which rules under s 412 may be made with respect to any matter, rules under s 412 may contain: (1) any such provision as is specified in Sch 9 (as amended) (see *infra*) or corresponds to provision contained immediately before 29 December 1986 (see para 2 ante) in rules made under the Bankruptcy Act 1914 s 132 (repealed); and (2) such incidental, supplemental and transitional provisions as may appear to the Lord Chancellor necessary or expedient: Insolvency Act 1986 s 412(2).

The power to make rules conferred by s 412 is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 412(3). Regulations made by the Secretary of State under a power conferred by rules under s 412 must be made by statutory instrument and, after being made, must be laid before each House of Parliament: s 412(4). Nothing in s 412 prejudices any power to make rules of court: s 412(5).

The provisions capable of inclusion in individual insolvency rules contained in Sch 9 (amended by the Insolvency Act 2000 s 13(1)) are as follows:

#### COURTS

- 81 (1) provision with respect to the arrangement and disposition of the business under the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) of courts having jurisdiction for the purpose of Pts VIII-XI (ss 252-385) (as amended), including provision for the allocation of proceedings under Pts VIII-XI (ss 252-385) (as amended) to particular courts and for the transfer of such proceedings from one court to another;



- 82 (2) provision for enabling a registrar in bankruptcy of the High Court or a district judge of a county court having jurisdiction for the purposes of Pts VIII-XI (ss 252-385) (as amended) to exercise such of the jurisdiction conferred for those purposes on the High Court or, as the case may be, that county court as may be prescribed;
- 83 (3) provision for regulating the practice and procedure of any court exercising jurisdiction for the purposes of Pts VIII-XI (ss 252-385) (as amended), being any provision that could be made by rules of court;
- 84 (4) provision conferring rights of audience, in courts exercising jurisdiction for the purposes of Pts VIII-XI (ss 252-385) (as amended), on the official receiver and on solicitors;

#### NOTICES ETC

- 85 (5) provision requiring notice of any proceedings under Pts VIII-XI (ss 252-385) (as amended) or of any matter relating to or arising out of a proposal under Pt VIII (ss 252-263) (see para 81 et seq ante) or a bankruptcy to be given or published in the prescribed manner;
- 86 (6) provision with respect to the form, manner of serving, contents and proof of any petition, application, order, notice, statement or other document required to be presented, made, given, published or prepared under any enactment contained in Pts VIII-XI (ss 252-385) (as amended) or subordinate legislation under Pts VIII-XI (ss 252-385) (as amended) or Pt XV (ss 411-422) (as amended), including provision requiring prescribed matters to be verified by affidavit;
- 87 (7) provision specifying the persons to whom any notice under Pts VIII-XI (ss 252-385) (as amended) is to be given;

#### REGISTRATION OF VOLUNTARY ARRANGEMENTS

- 88 (8) provision for the registration of voluntary arrangements approved under Pt VIII (ss 252-263), including provision for the keeping and inspection of a register;

#### INTERIM RECEIVER

- 89 (9) provision as to the manner in which an interim receiver appointed under s 286 (see para 222 et seq ante) is to carry out his functions, including any such provision as is specified in relation to the trustee of a bankrupt's estate in Sch 9 para 21 (see head (21) infra) or Sch 9 para 27 (see head (27) infra);

#### RECEIVER OR MANAGER

- 90 (10) provision as to the manner in which the official receiver is to carry out his functions as receiver or manager of a bankrupt's estate under s 287 (see para 233 ante), including any such provision as is specified in relation to the trustee of a bankrupt's estate in Sch 9 para 21 (see head (21) infra) or Sch 9 para 27 (see head (27) infra);

#### ADMINISTRATION OF INDIVIDUAL INSOLVENCY

- 91 (11) provision with respect to the certification of the appointment of any person as trustee of a bankrupt's estate and as to the proof of that appointment;
- 92 (12) the following provision with respect to meetings of creditors:
  - 1. (a) provision as to the manner of summoning a meeting (including provision as to how any power to require a meeting is to be exercised, provision as to the manner of determining the value of any debt for the purposes of any such power and provision making the exercise of any such power subject to the deposit of a sum sufficient to cover the expenses likely to be incurred in summoning and holding a meeting);
  - 2.
  - 2. (b) provision specifying the time and place at which a meeting may be held and the period of notice required for a meeting;
  - 3.
  - 3. (c) provision as to the procedure to be followed at such a meeting (including the manner in which decisions may be reached by a meeting and the manner in which the value of any vote at a meeting is to be determined);
  - 4.

- 5           4. (d) provision for requiring a bankrupt or debtor to attend a meeting;
5. (e) provision creating, in the prescribed circumstances, a presumption that a meeting  
6           has been duly summoned and held; and
6. (f) provision as to the manner of proving the decisions of a meeting;
- 7
- 93       (13) provision as to the functions, membership and proceedings of a creditors' committee  
            established under s 301 (see para 328 et seq ante);
- 94       (14) provision as to the manner in which any requirement that may be imposed on a person  
            under Pts VIII-XI (ss 252-385) (as amended) by the official receiver, the trustee of a bankrupt's  
            estate or a special manager appointed under s 370 (see para 236 et seq ante) is to be imposed  
            and, in the case of any requirement imposed under s 305(3) (information etc to be given by the  
            trustee to the official receiver: see para 456 ante), provision conferring power on the court to  
            make orders for the purpose of securing compliance with that requirement;
- 95       (15) provision as to the manner in which any requirement imposed by virtue of s 310(3)  
            (compliance with income payments order: see para 449 et seq ante) is to take effect;
- 96       (16) provision as to the terms and conditions that may be included in a charge under s 313  
            (dwelling house forming part of bankrupt's estate: see para 401 ante);
- 97       (17) provision as to the debts that may be proved in any bankruptcy, as to the manner and  
            conditions of proving a debt and as to the manner and expenses of establishing the value of any  
            debt or security;
- 98       (18) provision with respect to the manner of the distribution of a bankrupt's estate, including  
            provision with respect to unclaimed funds and dividends;
- 99       (19) provision modifying the application of Pts VIII-XI (ss 252-385) (as amended) in relation to  
            a debtor or bankrupt who has died;

## FINANCIAL PROVISIONS

- 100       (20) provision as to the amount, or manner of determining the amount, payable to an interim  
            receiver, the trustee of a bankrupt's estate or a special manager appointed under s 370 by way  
            of remuneration for the performance of functions in connection with or arising out of the  
            bankruptcy of any person;
- 101       (21) provision with respect to the manner in which moneys received by the trustee of a  
            bankrupt's estate in the course of carrying out his functions as such are to be invested or  
            otherwise handled and with respect to the payment of interest on sums which, in pursuance of  
            rules made by virtue of this head, have been paid into the Insolvency Services Account (see para  
            26 ante);
- 102       (22) provision as to the fees, costs, charges and other expenses that may be treated as the  
            expenses of a bankruptcy;
- 103       (23) provision as to the fees, costs, charges and other expenses that may be incurred for any  
            of the purposes of Pt VIII (ss 252-263) or in the administration of any voluntary arrangement  
            approved under Pt VIII (ss 252-263);

## INFORMATION AND RECORDS

- 104       (24) provision requiring registrars and other officers of courts having jurisdiction for the  
            purposes of Pts VIII-XI (ss 252-385) (as amended):
  7. (a) to keep books and other records with respect to the exercise of that jurisdiction and  
8           of jurisdiction under the Deeds of Arrangement Act 1914 (see para 859 et seq post); and
  8. (b) to make returns to the Secretary of State of the business of the courts;
- 9

- 105 (25) provision requiring a creditor or a committee established under s 301 (see para 328 et seq ante) to be supplied, on payment in prescribed cases of the prescribed fee, with such information and with copies of such documents as may be prescribed;
- 106 (26) provision as to the manner in which public examinations under s 290 (see para 291 et seq ante) and proceedings under ss 366-368 (see para 307 et seq ante) are to be conducted, as to the circumstances in which records of such examinations and proceedings are to be made available to prescribed persons and as to the costs of such examinations and proceedings;
- 107 (27) provision imposing requirements with respect to:
9. (a) the preparation and keeping by the trustee of a bankrupt's estate, or the supervisor of a voluntary arrangement approved under Pt VIII (ss 252-263), of prescribed books, accounts and other records;
- 10
10. (b) the production of those books, accounts and records for inspection by prescribed persons;
- 11
11. (c) the auditing of accounts kept by the trustee of a bankrupt's estate or the supervisor of such a voluntary arrangement;
- 12
- 108 (28) provision requiring the person who is the supervisor of a voluntary arrangement approved under Pt VIII (ss 252-263), when it appears to him that the voluntary arrangement has been fully implemented and that nothing remains to be done by him under it:
12. (a) to give notice of that fact to persons bound by the voluntary arrangement; and
- 13
13. (b) to report to those persons on the carrying out of the functions conferred on the supervisor of it;
- 14
- 109 (29) provision as to the manner in which the trustee of a bankrupt's estate is to act in relation to the books, papers and other records of the bankrupt, including provision authorising their disposal;

#### GENERAL

- 110 (30) provision conferring power on the Secretary of State to make regulations with respect to so much of any matter that may be provided for in the rules as relates to the carrying out of the functions of an interim receiver appointed under s 286 (see para 222 et seq ante), of the official receiver while acting as receiver or manager under s 287 (see para 233 et seq ante) or of the trustee of a bankrupt's estate;
- 111 (31) provision conferring a discretion on the court;
- 112 (32) provision making non-compliance with any of the rules a criminal offence;
- 113 (33) provision making different provision for different cases, including different provisions for different areas.

In exercise of the power so conferred the Secretary of State made the Insolvency Rules 1986, SI 1986/1925 (amended by SI 1987/1919; SI 1989/397; SI 1991/495; SI 1993/602; SI 1995/586; SI 1998/1129; SI 1999/359; SI 1999/1022; SI 2001/763; SI 2001/1149) and the Bankruptcy (Financial Services and Markets Act 2000) Rules 2001, SI 2001/3634.

The Secretary of State may also make regulations for the purpose of giving effect to the Insolvency Act 1986 Pt XIII (ss 388-398) (as amended) (see para 42 et seq ante): s 419(1). Without prejudice to the generality of s 419(1) or to any provision of Pt XIII (ss 388-398) (as amended) by virtue of which regulations may be made with respect to any matter, regulations under s 419 may contain: (i) provision as to the matters to be taken into account in determining whether a person is a fit and proper person to act as an insolvency practitioner; (ii) provision prohibiting a person from so acting in prescribed cases in which a conflict of interest will or may arise; (iii) provision imposing requirements with respect to the preparation and keeping by a person who acts as an insolvency practitioner of prescribed books, accounts and other records, and the production of those books, accounts and records to prescribed persons; (iv) provision conferring power on prescribed persons to require any person who acts or has acted as an insolvency practitioner to answer any inquiry in relation to a case in

which he is so acting or has so acted, and to apply to a court to examine such a person or any other person on oath concerning such a case; (v) provision making non-compliance with any of the regulations a criminal offence; and (vi) such incidental, supplemental and transitional provisions as may appear to the Secretary of State necessary or expedient: s 419(2). Any power conferred by Pt XIII (ss 388-398) (as amended) or Pt XV (ss 411-422) (as amended) to make regulations, rules or orders is exercisable by statutory instrument subject to annulment by resolution of either House of Parliament: s 419(3). Any rule or regulation under Pt XIII (ss 388-398) (as amended) or Pt XV (ss 411-422) (as amended) may make different provision with respect to different cases or descriptions of cases, including different provision for different areas: s 419(4). For the meaning of 'subordinate legislation' see para 2 note 7 ante.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, ss 412, 419 apply: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

3 le the committee established under the Insolvency Act 1976 s 10 (repealed).

4 Insolvency Act 1986 s 413(1). In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 413 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 36.

5 Insolvency Act 1986 s 413(3); Courts and Legal Services Act 1990 s 74(1)(a).

6 Insolvency Act 1986 s 413(4).

7 Ibid s 413(2). The rules referred to in the text supra are those made under s 411 (company insolvency: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1041) and s 412 (see note 2 supra).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 753 Rules and regulations; Insolvency Rules Committee

TEXT AND NOTES--Insolvency Act 1986 ss 412, 413 further amended: Constitutional Reform Act 2005 Sch 4 paras 189, 190. See also 2005 Act s 19, Sch 7 para 4. Insolvency Act 1986 s 412 further amended: Tribunals, Courts and Enforcement Act 2007 Sch 20 para 8.

NOTE 2--Rules under the Insolvency Act 1986 s 412 for the purpose of giving effect to EC Regulation 1346/2000 may not create an offence of a kind referred to in the European Communities Act 1972 Sch 2 para 1(1)(d): 1986 Act s 412(2B) (s 412(2A), (2B) added by SI 2002/1037). For the purposes of head (1), a reference in the 1986 Act Sch 9 to doing anything under or for the purposes of a provision of the 1986 Act includes a reference to doing anything under or for the purposes of EC Council Regulation 1346/2000, in so far as the provision of the 1986 Act relates to a matter to which EC Council Regulation 1346/2000 applies: 1986 Act s 412(2A).

The 1986 Act Sch 9 has been amended by the Enterprise Act 2002 s 271(2), Sch 23 para 16, so that the following provisions are also capable of inclusion in individual insolvency rules:

(21A) provision enabling the Secretary of State to set the rate of interest paid on sums which have been paid into the Insolvency Services Account (under the heading 'Financial Provisions');

(34) provision about the official receiver acting as nominee or supervisor in relation to a voluntary arrangement under the 1986 Act Pt VIII (ss 252-263G), including (a) provision requiring the official receiver to act in specified circumstances; (b) provision about remuneration; (c) provision prescribing terms or conditions to be treated as forming part of a voluntary arrangement in relation to which the official receiver acts as nominee or supervisor; (d) provision enabling those terms or conditions to be varied or excluded, in specified circumstances or subject to specified conditions, by express provision in an arrangement;

(35) provision about bankruptcy restrictions orders, interim orders and undertakings, including (a) provision about evidence; (b) provision enabling the amalgamation of the register mentioned in the 1986 Act Sch 4A para 12 (see PARA 646A) with another register; (c) provision enabling inspection of that register by the public.

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#### **754. Application of the Insolvency Rules 1986.**

The Insolvency Rules 1986<sup>1</sup> apply, save where otherwise expressly provided, to all proceedings under the Insolvency Act 1986 or the Insolvency Rules 1986 commenced on or after 29 December 1986<sup>2</sup>.

<sup>1</sup> The Insolvency Rules 1986, SI 1986/1925 (amended by SI 1987/1919; SI 1989/397; SI 1991/495; SI 1993/602; SI 1995/586; SI 1998/1129; SI 1999/359; SI 1999/1022; SI 2001/763; SI 2001/1149).

<sup>2</sup> Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.14(1)(b), (c). The Insolvency Rules 1986, SI 1986/1925 (as amended: see note 1 *supra*) apply to all insolvency proceedings on and after 11 January 1988 whenever those proceedings were commenced: Insolvency (Amendment) Rules 1987, SI 1987/1919, r 3(1), (2). As to winding-up proceedings see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 432 et seq.

### **UPDATE**

#### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **755. Use of prescribed forms.**

The forms contained in the Insolvency Rules 1986<sup>1</sup> must be used in and in connection with insolvency proceedings<sup>2</sup>, whether in the High Court or a county court<sup>3</sup>; and they must be used with such variations, if any, as the circumstances may require<sup>4</sup>.

1     I.e. the Insolvency Rules 1986, SI 1986/1925, r 12.7(1), (2), Sch 4 (amended by SI 1987/1919; SI 1991/495; SI 2001/1149).

2     For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

3     Insolvency Rules 1986, SI 1986/1925, r 12.7(1).

4     Ibid r 12.7(2). Where any form contained in Sch 4 (as amended: see note 1 supra) is substantially the same as one used for a corresponding purpose under either: (1) the law and practice obtaining before the coming into force of the Insolvency Rules 1986, SI 1986/1925 (as amended) (see para 754 ante); or (2) if the form was first required to be used after the coming into force of such rules, the law and practice obtaining before the making of the requirement, whichever was appropriate in any case, the latter might continue to be used, with necessary modifications, until 1 March 1988: r 12.7(3) (substituted by SI 1987/1919).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/A. IN GENERAL/756. Application of the Civil Procedure Rules.

### 756. Application of the Civil Procedure Rules.

Except so far as inconsistent with the Insolvency Rules 1986<sup>1</sup>, the Civil Procedure Rules and the practice of the High Court and of the county court, including any Practice Direction<sup>2</sup>, apply to insolvency proceedings<sup>3</sup> in the High Court, and the county court, in either case with any necessary modifications<sup>4</sup>.

1     I.e. the Insolvency Rules 1986, SI 1986/1925 (as amended).

2     For the meaning of 'Practice Direction' see para 2 note 6 ante.

3     For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

4     Insolvency Rules 1986, SI 1986/1925, r 7.51(1) (substituted by SI 1999/1022). All insolvency proceedings must be allocated to the multi-track for which CPR Pt 29 (see CIVIL PROCEDURE vol 11 (2009) PARA 293 et seq) makes provision; accordingly those provisions of the Civil Procedure Rules 1998, SI 1998/3132 (as amended) which provide for allocation questionnaires and track allocation (see CIVIL PROCEDURE vol 11 (2009) PARA 246 et seq) will not apply: Insolvency Rules 1986, SI 1986/1925, r 7.51(2) (substituted by SI 1999/1022). In general, the Civil Procedure Rules 1998, SI 1998/3132 (as amended) do not apply to insolvency proceedings, except to the extent that they are applied to those proceedings by another enactment: see CPR 2.1(2), Table; and CIVIL PROCEDURE vol 11 (2009) PARA 32.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **756 Application of the Civil Procedure Rules**

TEXT AND NOTES--SI 1986/1925 r 7.51 substituted by r 7.51A: SI 2010/686.

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### **757. Regulations by Secretary of State.**

The Secretary of State has power to make regulations with respect to certain matters arising in individual insolvency<sup>1</sup>.

<sup>1</sup> See paras 21, 753 note 2 ante. An example of such regulations is the Insolvency Regulations 1994, SI 1994/2507 (as amended) relating to books, accounts and records to be kept by the trustee, the handling of moneys etc: see para 380 et seq ante. These regulations were made in exercise of the powers conferred on the Secretary of State by the Insolvency Rules 1986, SI 1986/1925, r 12.1 (as amended) and the Insolvency Act 1986 s 412, Sch 9 (as amended): see para 753 ante.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/A. IN GENERAL/758. Insolvency practitioner's security.

### **758. Insolvency practitioner's security.**

Wherever under the Insolvency Rules 1986<sup>1</sup> any person has to appoint, or certify the appointment of, an insolvency practitioner<sup>2</sup> to any office, he is under a duty to satisfy himself that the person appointed or to be appointed has security for the proper performance of his functions<sup>3</sup>.

It is the duty of the creditors' committee in bankruptcy<sup>4</sup>, and of any committee of creditors established for the purposes of a voluntary arrangement<sup>5</sup>, to review from time to time the adequacy of the responsible insolvency practitioner's<sup>6</sup> security<sup>7</sup>.

In any insolvency proceedings<sup>8</sup> the costs of the responsible insolvency practitioner's security must be defrayed as an expense of the proceedings<sup>9</sup>.

- 1 le the Insolvency Rules 1986, SI 1986/1925 (as amended).
- 2 As to insolvency practitioners and their qualification see para 42 et seq ante.
- 3 Insolvency Rules 1986, SI 1986/1925, r 12.8(1). As to the requirement for security see para 54 ante.
- 4 See para 328 et seq ante.
- 5 le under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.
- 6 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.
- 7 Insolvency Rules 1986, SI 1986/1925, r 12.8(2).
- 8 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.
- 9 Insolvency Rules 1986, SI 1986/1925, r 12.8(3). As to the prescribed order of priority of payment of such expenses see para 573 et seq ante.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/A. IN GENERAL/759. Security in court.

### 759. Security in court.

Where security has to be given to the court, otherwise than in relation to costs, it may be given by guarantee, bond or the payment of money into court<sup>1</sup>.

A person proposing to give a bond as security must give notice<sup>2</sup> to the party in whose favour the security is required, and to the court, naming those who are to be sureties to the bond<sup>3</sup>. The court must forthwith give notice to both the parties concerned of a venue<sup>4</sup> for the execution of the bond and the making of any objection to the sureties<sup>5</sup>. The sureties must make an affidavit<sup>6</sup> of their sufficiency, unless dispensed with by the party in whose favour the security is required, and must, if required by the court, attend the court to be cross-examined<sup>7</sup>.

- 1 Insolvency Rules 1986, SI 1986/1925, r 7.58(1).
- 2 As to the mode of giving notice see para 797 post.
- 3 Insolvency Rules 1986, SI 1986/1925, r 7.58(2).
- 4 For the meaning of 'venue' see para 84 note 21 ante.
- 5 Insolvency Rules 1986, SI 1986/1925, r 7.58(3).



6 As to the use of witness statements instead of affidavits in insolvency proceedings see *ibid* r 7.57(5) (as substituted); and para 793 post.

7 *Ibid* r 7.58(4).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **759 Security in court**

TEXT AND NOTES--SI 1986/1925 r 7.58 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/A. IN GENERAL/760. Time limits.

### **760. Time limits.**

The normal rules relating to the calculation of any period of time<sup>1</sup> apply as regards computation of time in respect of anything required or authorised by the Insolvency Rules 1986<sup>2</sup> to be done<sup>3</sup>. The normal rules as to the court's general powers of management<sup>4</sup> apply so as to enable the court to extend or shorten the time for compliance with anything required or authorised to be done by the Insolvency Rules 1986<sup>5</sup>. Where, by any provision of the Insolvency Act 1986<sup>6</sup> or the Insolvency Rules 1986, the time for doing anything is limited, the court may extend the time, either before or after it has expired, on such terms, if any, as it thinks fit<sup>7</sup>.

1 *Ie* CPR 2.8: see CIVIL PROCEDURE vol 11 (2009) PARA 88.

2 *Ie* the Insolvency Rules 1986, SI 1986/1925 (as amended).

3 *Ibid* r 12.9(1) (substituted by SI 1999/1022).

4 *Ie* CPR 3.1(2)(a): see CIVIL PROCEDURE vol 11 (2009) PARA 249.

5 Insolvency Rules 1986, SI 1986/1925, r 12.9(2) (substituted by SI 1999/1022).

6 *Ie* the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

7 *Ibid* s 376. As to the application of s 376 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 157 note 3 ante.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/A. IN GENERAL/761. Formal defects in procedure.

### **761. Formal defects in procedure.**

No insolvency proceedings<sup>1</sup> are to be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court<sup>2</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.55. Under the Bankruptcy Act 1914 (repealed) and the Bankruptcy Rules 1952, SI 1952/2113 (revoked) the court was less inclined to remedy an irregularity in or about a bankruptcy notice than one which occurred in or about a bankruptcy petition. See *Re Collier, ex p Dan Rylands Ltd* (1891) 8 Morr 80; cf *Re Low, ex p Gibson* [1895] 1 QB 734, CA (where the defect was not material). For instances of defects held not to be formal but substantial see *Re Howes, ex p Hughes* [1892] 2 QB 628, CA (description of creditors in judgment not followed in bankruptcy notice); *Re Miller, ex p Miller* (1893) 10 Morr 183 (amount due under judgment misstated); *Re OCS, ex p Debtor* [1904] 2 KB 161, CA (bankruptcy notice founded on two judgment debts); *Re A Debtor (No 21 of 1950), ex p Debtor v Bowmaker Ltd* [1951] Ch 313, [1950] 2 All ER 1129, DC (copy of bankruptcy notice served on debtor with wrong county court heading), applied, in *Pillai v Comptroller of Income Tax* [1970] AC 1124, [1970] 2 WLR 1053, PC, to the Malaysian bankruptcy statutes; *Re A Debtor (No 41 of 1951), ex p Debtor v Hunter (Liquidator of Marvel Paper Products Ltd)* [1952] Ch 192, [1952] 1 All ER 107 (debt due to a company in liquidation, but notice served and petition presented in the liquidator's, and not the company's, name).

The Insolvency Rules 1986, SI 1986/1925, r 7.55 does not apply to a statutory demand, which is not an insolvency proceeding within r 13.7 (see para 35 note 4 ante): *Re A Debtor (No 1 of 1987, Lancaster), ex p Debtor v Royal Bank of Scotland plc* [1989] 2 All ER 46, sub nom *Re A Debtor (No 1 of 1987)* [1989] 1 WLR 271, CA. A formal defect does not, however, invalidate a statutory demand where the debtor is not misled by the mistake: *Re A Debtor (No 190 of 1987)* (1988) Times, 21 May. A debtor applying to set aside a statutory demand under the Insolvency Rules 1986, SI 1986/1925, r 6.5(4)(d) (see para 158 text and note 10 ante) on 'other grounds' must do more than show that the demand is perplexing; he must show what is the true position between himself and the creditor or explain why he cannot do so: *Re A Debtor (No 1 of 1987, Lancaster), ex p Debtor v Royal Bank of Scotland plc* supra.

As to the effect of a formal defect in the appointment, election or qualification of a trustee, special manager or member of a creditors' committee see para 762 post; and as to the validation of meetings where notice is not received by all those who are entitled to be summoned see para 802 post.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/A. IN GENERAL/762. Formal defects in appointment or qualification.

## **762. Formal defects in appointment or qualification.**

The acts of a person as the trustee of a bankrupt's estate<sup>1</sup> or as a special manager<sup>2</sup>, and the acts of the creditors' committee<sup>3</sup> established for any bankruptcy, are valid notwithstanding any defect in the appointment, election or qualifications of the trustee or manager or, as the case may be, of any member of the committee<sup>4</sup>.

1 See para 316 et seq ante.

2 See para 239 ante.

3 See para 330 ante.

4 Insolvency Act 1986 s 377. There is no equivalent provision in the case of a formal defect in the appointment or qualification of a supervisor of a voluntary arrangement approved under Pt VIII (ss 252-263).

As to the application of s 377 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 239 note 6 ante.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/A. IN GENERAL/763. Exemption from stamp duty.

## **763. Exemption from stamp duty.**

Stamp duty may not be charged on:

- 989 (1) any document, being a deed, conveyance, assignment, surrender, admission or other assurance relating solely to property which is comprised in a bankrupt's estate and which, after the execution of that document, is or remains at law or in equity the property of the bankrupt or of the trustee of that estate;
- 990 (2) any writ, order or certificate or other instrument relating solely to the property of a bankrupt or to any bankruptcy proceedings<sup>1</sup>.

1 Insolvency Act 1986 s 378. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 378 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 30. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/B. APPLICATIONS TO THE COURT/764. 'The court'; 'the registrar'.

## **B. APPLICATIONS TO THE COURT**

### **764. 'The court'; 'the registrar'.**

Anything to be done under or by virtue of the Insolvency Act 1986 or the Insolvency Rules 1986<sup>1</sup> by, to or before the court may be done by, to or before a judge or the registrar<sup>2</sup>. The registrar<sup>3</sup> may authorise any act of a formal or administrative character which is not by statute his responsibility to be carried out by the chief clerk or any other officer of the court acting on his behalf, in accordance with directions given by the Lord Chancellor<sup>4</sup>.

'The court', in relation to any matter, means the court to which<sup>5</sup> proceedings with respect to that matter are allocated or transferred<sup>6</sup>.

1    le the Insolvency Rules 1986, SI 1986/1925 (as amended).

2    Ibid rr 13.1, 13.2(1). The following applications must be made direct to the judge and, unless otherwise ordered, must be heard in public:

114   (1)    applications for the committal of any person to prison for contempt;

115   (2)    applications for injunctions or for the modification or discharge of injunctions;

116   (3)    applications for interlocutory relief or directions after the matter has been referred to the judge:

*Practice Direction-Insolvency Proceedings* para 9.1.

All other applications must be made to the registrar or the district judge in the first instance; and he must give any necessary directions and may, if the application is within his jurisdiction to determine, in his discretion either hear and determine it himself or refer it to the judge: para 9.2.

The following matters must be heard in public:

117   (a)    the public examination of debtors;

118   (b)    opposed applications for discharge or for the suspension or lifting of the suspension of discharge;

119   (c)    opposed applications for permission to be a director;

120   (d)    in any case where the petition was presented or the receiving order or order for adjudication was made before 29 December 1986 (see para 2 ante), those matters and applications referred to in the Bankruptcy Rules 1952, SI 1952/2113, r 8 (revoked);

- 121 (e) all matters and applications heard by the judge, except matters and applications referred by the registrar or the district judge to be heard by the judge in private or directed by the judge to be so heard:

*Practice Direction-Insolvency Proceedings* para 9.3.

In accordance with the directions given by the Lord Chancellor the registrar has authorised certain applications in the High Court to be dealt with by the court manager of the bankruptcy court pursuant to the Insolvency Rules 1986, SI 1986/1925, r 13.2(2) (see *infra*):

- 122 (i) by petitioning creditors to extend time for hearing petitions pursuant to the Insolvency Act 1986 s 376 (see para 760 ante);
- 123 (ii) by the official receiver to transfer proceedings from the High Court to a county court pursuant to the Insolvency Rules 1986, SI 1986/1925, r 7.13 (see para 735 ante) and to amend the full title of proceedings pursuant to r 6.35 (as amended) (see para 199 ante) and r 6.47 (as amended) (see para 205 ante):

*Practice Direction-Insolvency Proceedings* para 9.5.

3 In individual insolvency proceedings 'the registrar' means a Registrar in Bankruptcy of the High Court, or the district judge or assistant district judge of a county court: Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.2(3); Courts and Legal Services Act 1990 s 74(1)(a), (b). Where CPR 2.4 (see CIVIL PROCEDURE vol 11 (2009) PARAS 49, 61) provides for the court to perform any act, that act may be performed by a Registrar in Bankruptcy for the purpose of insolvency proceedings in the High Court: *Practice Direction-Insolvency Proceedings* para 1.4.

4 Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.2(2).

5 In accordance with the Insolvency Act 1986 s 373 (see para 734 ante) and the Insolvency Rules 1986, SI 1986/1925 (as amended).

6 Insolvency Act 1986 s 385(1). As to allocation of individual insolvency proceedings see paras 6, 7 ante; and as to the transfer of bankruptcy proceedings see para 734 et seq ante. As to the application of s 385 (as amended) in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 6 note 8 ante.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, 'the court', in relation to any matter, means the court to which, in accordance with s 373 and the Insolvency Rules 1986, SI 1986/1925 (as amended), proceedings with respect to that matter are allocated or transferred; and, subject thereto, 'the court' means the court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his death: Insolvency Act 1986 s 385(1) (amended by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 33). As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### 764 'The court'; 'the registrar'

NOTE 3--See *Thakerar v Lynch Hall & Hornby* [2005] EWHC 2752 (Ch), [2006] 1 WLR 1513.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/B. APPLICATIONS TO THE COURT/765. Applications.

## **765. Applications.**

The following provisions<sup>1</sup> apply to any application made to the court<sup>2</sup> under the Insolvency Act 1986 or the Insolvency Rules 1986<sup>3</sup> except a petition for a bankruptcy order<sup>4</sup>.

In the following provisions, except in so far as the context otherwise requires:

- 991 (1) 'originating application' means an application to the court which is not an application in pending proceedings before the court; and
- 992 (2) 'ordinary application' means any other application to the court<sup>5</sup>.

Every application must be in the form appropriate to the application concerned<sup>6</sup>.

1    Ie the Insolvency Rules 1986, SI 1986/1925, Pt 7 Ch 1 (rr 7.3-7.10): see paras 766-770, 794 post.

2    See para 764 ante.

3    Ie the Insolvency Rules 1986, SI 1986/1925 (as amended).

4    Ibid r 7.1. The reference to a petition for a bankruptcy order is to such a petition under the Insolvency Act 1986 Pt IX (ss 264-371 (as amended): see para 124 et seq ante): Insolvency Rules 1986, SI 1986/1925, r 7.1(c).

5    Ibid r 7.2(1). For the prescribed form of originating application see rr 7.2, 12.7(1), (2), Sch 4, Form 7.1; and for the prescribed form of ordinary application see Sch 4, Form 7.2.

6    Ibid r 7.2(2). An ordinary application is not a statement of case and accordingly it cannot be struck out as disclosing no reasonable cause of action: *Port v Auger* [1994] 3 All ER 200, [1994] 1 WLR 862, CA; cf CPR 3.4 and CIVIL PROCEDURE vol 11 (2009) PARA 252.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **765 Applications**

NOTE 4--SI 1986/1925 r 7.1 amended: SI 2003/1730.

TEXT AND NOTES 5, 6--SI 1986/1925 r 7.2 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/B. APPLICATIONS TO THE COURT/766. Form and contents of application.

## **766. Form and contents of application.**

Each application must be in writing and must state:

- 993 (1) the names of the parties;
- 994 (2) the nature of the relief or order applied for or the directions sought from the court;
- 995 (3) the names and addresses of the persons, if any, on whom it is intended to serve the application or that no person is intended to be served;
- 996 (4) where notice of the application is required<sup>1</sup> to be given to specified persons, the names and addresses of all those persons, so far as known to the applicant; and
- 997 (5) the applicant's address for service<sup>2</sup>.

An originating application<sup>3</sup> must set out the grounds on which the applicant claims to be entitled to the relief or order sought<sup>4</sup>; and the application must be signed by the applicant if he is acting in person or, when he is not so acting, by or on behalf of his solicitor<sup>5</sup>.

1 le by the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 Ibid r 7.3(1). For the prescribed forms of application see para 765 note 5 ante.

3 For the meaning of 'originating application' see para 765 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 7.3(2).

5 Ibid r 7.3(3). For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 766 Form and contents of application

NOTE 5--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/B. APPLICATIONS TO THE COURT/767. Filing and service of application.

### 767. Filing and service of application.

The application must be filed in court<sup>1</sup>, accompanied by one copy and a number of additional copies equal to the number of persons who are to be served with the application<sup>2</sup>.

Subject to the following provisions<sup>3</sup>, or unless the rule under which the application is brought provides otherwise, or the court otherwise orders, on the presentation of the documents mentioned above, the court must fix a venue<sup>4</sup> for the application to be heard<sup>5</sup>.

Unless the court otherwise directs, the applicant must serve a sealed copy of the application, indorsed with the venue for the hearing, on the respondent named in the application, or on each respondent, if more than one<sup>6</sup>.

The court may give any of the following directions:

- 998 (1) that the application be served on persons other than those specified by the relevant provision<sup>7</sup>;
- 999 (2) that the giving of notice to any person may be dispensed with;
- 1000 (3) that notice be given in some way other than that specified above<sup>8</sup>.

Unless the relevant provision under which the application is made provides otherwise, and subject to the following provisions, the application must be served at least 14 days before the date fixed for the hearing<sup>9</sup>.

Where the case is one of urgency, the court may, without prejudice to its general power to extend or abridge time limits<sup>10</sup>, hear the application immediately, either with or without notice to, or the attendance of, other parties, or authorise a shorter period of service than that mentioned above; and any such application may be heard on terms providing for the filing or service of documents, or the carrying out of other formalities, as the court thinks fit<sup>11</sup>.

1 For the meaning of 'file in court' see para 95 note 10 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.4(1).

3 See *infra*; and para 768 post.

4 For the meaning of 'venue' see para 84 note 21 ante.

5 Insolvency Rules 1986, SI 1986/1925, r 7.4(2).

6 *Ibid* r 7.4(3).

7 *Ibid* of the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

8 *Ibid* r 7.4(4).

9 *Ibid* r 7.4(5).

10 See para 760 ante.

11 Insolvency Rules 1986, SI 1986/1925, r 7.4(6).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in **PARA 2 NOTE 5**.

### 767 Filing and service of application

**NOTE 11**--SI 1986/1925 r 7.4(6) enables the court to make an interim *ex parte* order suspending a bankrupt's automatic discharge from bankruptcy, where it considers that the making of such an order is urgent and appropriate: *Bagnall v Official Receiver* [2003] EWHC 1398 (Ch), [2003] 3 All ER 613.



Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/B. APPLICATIONS TO THE COURT/768. Other hearings without notice being served on any other party.

### **768. Other hearings without notice being served on any other party.**

Where the relevant provisions<sup>1</sup> do not require service of the application on, or notice of it to be given to, any person, the court may hear the application without notice being served on any other party<sup>2</sup>; and, where the application is properly made without notice being served on any other party, the court may hear it forthwith, without fixing a venue<sup>3</sup> as is otherwise required<sup>4</sup>. Alternatively, the court may fix a venue for the application to be heard, in which case, so far as relevant, the above provisions<sup>5</sup> apply<sup>6</sup>.

1 le of the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 Ibid r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 7.5(1).

3 For the meaning of 'venue' see para 84 note 21 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 7.5(2). As to the usual requirement of the court to fix a venue see r 7.4(2); and para 767 ante.

5 le ibid r 7.4: see para 767 ante.

6 Ibid r 7.5(3).

### **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **768 Other hearings without notice being served on any other party**

TEXT AND NOTES--SI 1986/1925 r 7.5 substituted by r 7.5A: SI 2010/686.

NOTES 2, 4--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/B. APPLICATIONS TO THE COURT/769. Hearing of application; jurisdiction of registrars.

### **769. Hearing of application; jurisdiction of registrars.**

Unless allowed or authorised to be made otherwise, every application before the registrar<sup>1</sup> must, and every application before the judge may, be heard in chambers<sup>2</sup>.

Unless either the judge has given a general or special direction to the contrary, or it is not within the registrar's power to make the order required, the jurisdiction of the court to hear and determine the application may be exercised by the registrar, and the application must be made to the registrar in the first instance<sup>3</sup>.

Where the application is made to the registrar, he may refer to the judge any matter which he thinks should properly be decided by the judge, and the judge may either dispose of the matter or refer it back to the registrar with such directions as he thinks fit<sup>4</sup>.

Nothing in the above provisions precludes an application being made directly to the judge in a proper case<sup>5</sup>.

1 For the meaning of 'the registrar' see para 764 note 3 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.6(1). See further para 764 note 2 ante.

3 Ibid r 7.6(2).

4 Ibid r 7.6(3).

5 Ibid r 7.6(4).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 769 Hearing of application; jurisdiction of registrars

TEXT AND NOTES--SI 1986/1925 r 7.6 substituted by r 7.6A: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/B. APPLICATIONS TO THE COURT/770. Adjournment of hearing; directions.

### 770. Adjournment of hearing; directions.

The court may adjourn the hearing of an application<sup>1</sup> on such terms, if any, as it thinks fit<sup>2</sup>.

The court may at any time give such directions as it thinks fit as to:

- 1001 (1) service or notice of the application on or to any person, whether in connection with the venue<sup>3</sup> of a resumed hearing or for any other purpose;
- 1002 (2) whether particulars of claim and defence are to be delivered and generally as to the procedure on the application;
- 1003 (3) the manner in which any evidence is to be adduced at a resumed hearing and in particular, but without prejudice to the generality of this provision, as to the taking of evidence wholly or in part by affidavit<sup>4</sup> or orally, the cross-examination either before the judge or registrar on the hearing in the court or in chambers of

any deponents to affidavits and any report to be given by the official receiver or any other person<sup>5</sup>;  
1004 (4) the matters to be dealt with in evidence<sup>6</sup>.

1 As to the mode of application and the procedure see para 764 et seq ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.10(1).

3 For the meaning of 'venue' see para 84 note 21 ante.

4 As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5) (as substituted); and para 793 post.

5 ie any other person mentioned in *ibid* r 7.9(1)(b): see para 794 head (2) post.

6 *Ibid* r 7.10(2).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/B. APPLICATIONS TO THE COURT/771. Right of audience.

#### 771. Right of audience.

Official receivers and deputy official receivers have right of audience in insolvency proceedings<sup>1</sup>, whether in the High Court or a county court<sup>2</sup>; and, subject to this provision, rights of audience in insolvency proceedings are the same as obtained before 29 December 1986<sup>3</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.52(1).

3 *Ibid* r 7.52(2). 29 December 1986 is the date when the Insolvency Rules 1986, SI 1986/1925 (as amended) came into force: r 0.1. As to the rights of audience referred to see the Bankruptcy Act 1869 s 70 (repealed), and the Bankruptcy Act 1883 ss 93, 151 (repealed), the effect of which was saved by the Bankruptcy Act 1914 s 152 (repealed). The effect of these provisions was to give solicitors the right to appear before a bankruptcy judge. A solicitor was also entitled to appear in the Divisional Court (now defunct) (*Re Barnett, ex p Reynolds* (1885) 15 QBD 169, CA) but not before the Court of Appeal (*Re Ellerton* (1887) 3 TLR 324, CA). However, every solicitor is now deemed to have been granted by the Law Society a right of audience before every court in relation to all proceedings, exercisable in accordance with the qualification regulations and rules of conduct of the Law Society approved for the purposes of the Courts and Legal Services Act 1990 s 27 (as amended) (see LEGAL PROFESSIONS vol 65 (2008) PARA 497) in relation to the right: s 31(2)(a) (substituted by the Access to Justice Act 1999 s 36).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/B. APPLICATIONS TO THE COURT/772. Attendance of responsible insolvency practitioner.

### **772. Attendance of responsible insolvency practitioner.**

Where in any proceedings the attendance of the responsible insolvency practitioner's<sup>1</sup> solicitor is required, whether in court or in chambers, the insolvency practitioner himself need not attend, unless directed by the court<sup>2</sup>.

1 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.54.

### **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **772 Attendance of responsible insolvency practitioner**

TEXT AND NOTES--SI 1986/1925 r 7.54 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/B. APPLICATIONS TO THE COURT/773. Further information and disclosure.

### **773. Further information and disclosure.**

Any party to insolvency proceedings<sup>1</sup> may apply to the court for an order:

1005 (1) that any other party clarify any matter which is in dispute in the proceedings, or give additional information in relation to any such matter, in accordance with the general rules relating to further information<sup>2</sup>; or

1006 (2) to obtain disclosure from any other party in accordance with the general rules<sup>3</sup> relating to disclosure and inspection of documents<sup>4</sup>.

Any such application may be made without notice being served on any other party<sup>5</sup>.

- 1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.
- 2 le in accordance with CPR Pt 18: see CIVIL PROCEDURE vol 11 (2009) PARA 611 et seq.
- 3 le in accordance with CPR Pt 31: see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.
- 4 Insolvency Rules 1986, SI 1986/1925, r 7.60(1) (substituted by SI 1999/1022).
- 5 Insolvency Rules 1986, SI 1986/1925, r 7.60(2) (substituted by SI 1999/1022). As to the mode of application and the procedure see para 764 et seq ante.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/B. APPLICATIONS TO THE COURT/774. Payment into court.

#### **774. Payment into court.**

The general rules relating to payment into and out of court of money lodged in court as security for costs<sup>1</sup> apply to money lodged in court under the Insolvency Rules 1986<sup>2</sup>.

- 1 See CPR Pts 36, 37; and CIVIL PROCEDURE vol 11 (2009) PARA 729 et seq.
- 2 Insolvency Rules 1986, SI 1986/1925, r 7.59 (substituted by SI 1999/1022).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION/775. Title of proceedings.

## **C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION**

#### **775. Title of proceedings.**

Every proceeding in bankruptcy<sup>1</sup> must be intituled 'IN BANKRUPTCY'<sup>2</sup>.

1 le all proceedings under the Insolvency Act 1986 Pts IX-XI (ss 264-385) (as amended): see para 124 et seq ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.26(2). Rule 7.26(2) makes no reference to the bankrupt's name; cf r 7.26(1) (corporate insolvency: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1064). See, however, r 6.7(2) (creditor's petition: see para 161 ante), r 6.38(2) (debtor's petition: see para 189 ante), which provide that the particulars of the debtor determine the full title of the proceedings.

All petitions presented will be listed under the name of the debtor: *Practice Direction-Insolvency Proceedings* para 9.4.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### 775 Title of proceedings

TEXT AND NOTES--SI 1986/1925 rr 7.26-7.31 substituted by r 7.31A: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION/776. Court records; returns to the Secretary of State.

#### 776. Court records; returns to the Secretary of State.

The court must keep records of all insolvency proceedings<sup>1</sup>, and must cause to be entered in the records the taking of any step in the proceedings, and such decisions of the court in relation thereto, as the court thinks fit<sup>2</sup>.

The court must from time to time send to the Secretary of State the following particulars relating to bankruptcy proceedings:

- 1007 (1) the full title of the proceedings, including the number assigned to each case;
- 1008 (2) where a bankruptcy order has been made, the date of the order<sup>3</sup>.

The Secretary of State may, on the request of any person, furnish him with particulars sent by the court under these provisions<sup>4</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.27. As to the right to inspect court records see para 777 post.

3 Ibid r 7.29(1).

4 Ibid r 7.29(2).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 776 Court records; returns to the Secretary of State

TEXT AND NOTES--SI 1986/1925 rr 7.26-7.31 substituted by r 7.31A: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION/777. Inspection of records.

### 777. Inspection of records.

The court's records of insolvency proceedings<sup>1</sup> must be open to inspection by any person<sup>2</sup>. However, if in the case of a person applying to inspect the records the registrar is not satisfied as to the propriety of the purpose for which inspection is required, he may refuse to allow it; and the person may then apply forthwith and without notice to the judge, who may refuse the inspection or allow it on such terms as he thinks fit<sup>3</sup>. Such a decision of the judge is final<sup>4</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.28(1). It would appear from the wording of r 7.28(2) (see *infra*) that the right to inspect the court's records is exercisable on application to the registrar. For the meaning of 'registrar' see para 764 note 3 ante. As to the mode of application and the procedure see para 764 et seq ante.

3 Ibid r 7.28(2). Where inspection is not sought for a proper purpose, it may not be allowed: *Re an application under the Insolvency Rules 1986* [1994] 2 BCLC 104, [1994] BCC 369; and see *Re Creditnet Ltd* [1996] 1 WLR 1291, [1996] 2 BCLC 133. It appears, however, that seeking to exploit information for commercial purposes does not amount to an improper purpose: *Ex p Austintel Ltd* [1997] 1 WLR 616, sub nom *Re Austintel Ltd* [1997] 1 BCLC 233, CA.

4 Insolvency Rules 1986, SI 1986/1925, r 7.28(3). See also *Ex p Austintel Ltd* [1997] 1 WLR 616, sub nom *Re Austintel Ltd* [1997] 1 BCLC 233, CA.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 777 Inspection of records

TEXT AND NOTES--SI 1986/1925 rr 7.26-7.31 substituted by r 7.31A: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION/778. File of court proceedings.

### **778. File of court proceedings.**

In respect of all insolvency proceedings<sup>1</sup>, the court must open and maintain a file for each case; and, subject to directions of the registrar<sup>2</sup>, all documents relating to such proceedings must be placed on the relevant file<sup>3</sup>. No proceedings may be filed in the Central Office of the High Court<sup>4</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 For the meaning of 'the registrar' see para 764 note 3 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 7.30(1). As to the right to inspect the file see para 779 post.

4 Ibid r 7.30(2).

### **UPDATE**

#### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **778 File of court proceedings**

TEXT AND NOTES--SI 1986/1925 rr 7.26-7.31 substituted by r 7.31A: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION/779. Right to inspect the file.

### **779. Right to inspect the file.**

In the case of any insolvency proceedings<sup>1</sup>, the following have the right, at all reasonable times, to inspect the court's file<sup>2</sup> of the proceedings:

1009 (1) the person, who, in relation to those proceedings, is the responsible insolvency practitioner<sup>3</sup>;

1010 (2) any duly authorised officer of the Department of Trade and Industry; and

1011 (3) any person stating himself in writing to be a creditor of the individual to whom the proceedings relate<sup>4</sup>.



The same right of inspection is exercisable:

- 1012 (a) in proceedings<sup>5</sup> with respect to a voluntary arrangement proposed by a debtor under Part VIII of the Insolvency Act 1986, by the debtor; and
- 1013 (b) in bankruptcy proceedings by the bankrupt, any person against whom, or by whom, a bankruptcy petition has been presented, and any person who has been served<sup>6</sup> with a statutory demand<sup>7</sup>.

The right of inspection so conferred on any person may be exercised on his behalf by a person properly authorised by him<sup>8</sup>; and any person may, by special permission of the court, inspect the file<sup>9</sup>.

Such rights of inspection are not exercisable in the case of documents, or parts of documents, as to which the court directs, either generally or specially, that they are not to be made open to inspection without the court's permission; and an application for such a direction of the court may be made by the official receiver, by the person who, in relation to any proceedings, is the responsible insolvency practitioner, or by any party appearing to the court to have an interest<sup>10</sup>.

If, for the purpose of powers conferred on them<sup>11</sup>, the Secretary of State, the Department of Trade and Industry or the official receiver requires to inspect the file of any insolvency proceedings, and requests the transmission of the file, the court must comply with the request, unless the file is for the time being in use for the court's own purposes<sup>12</sup>.

The provisions relating to inspection of court records<sup>13</sup> also apply in respect of the court's file of any proceedings<sup>14</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 See para 778 ante.

3 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

4 Insolvency Rules 1986, SI 1986/1925, rr 7.31(1), 13.13(2).

5 Ie under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.

6 Ie under the Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 1 (rr 6.1-6.5): see para 154 et seq ante.

7 Ibid r 7.31(2)(b), (c).

8 Ibid r 7.31(3).

9 Ibid r 7.31(4).

10 Ibid r 7.31(5). As to the mode of application and the procedure see para 764 et seq ante.

11 Ie by the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

12 Ibid rr 7.31(6), 13.13(2).

13 Ie ibid r 7.28(2), (3): see para 777 ante. It follows that the right to inspect the file cannot be exercised for an improper purpose: see *Re an application under the Insolvency Rules 1986* [1994] 2 BCLC 104, [1994] BCC 369.

14 Insolvency Rules 1986, SI 1986/1925, r 7.31(7).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **779 Right to inspect the file**

TEXT AND NOTES--SI 1986/1925 rr 7.26-7.31 substituted by r 7.31A: SI 2010/686.

TEXT AND NOTE 4--For 'Department of Trade and Industry' read 'Department for Business, Innovation and Skills': SI 1986/1925 r 13.13(2) (amended by SI 2009/2748).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION/780. Filing of Gazette notices and advertisements.

## **780. Filing of Gazette notices and advertisements.**

In any court in which insolvency proceedings<sup>1</sup> are pending, an officer of the court must file a copy of every issue of the Gazette<sup>2</sup> which contains an advertisement relating to those proceedings<sup>3</sup>.

Where there appears in a newspaper an advertisement relating to insolvency proceedings pending in any court, the person inserting the advertisement must file a copy of it in that court; and the copy of the advertisement must be accompanied by, or have indorsed on it, such particulars as are necessary to identify the proceedings and the date of the advertisement's appearance<sup>4</sup>.

An officer of any court in which insolvency proceedings are pending must from time to time file a memorandum giving the date of, and other particulars relating to, any notice published in the Gazette, and any newspaper advertisements, which relate to proceedings so pending; and the officer's memorandum is prima facie evidence that any notice or advertisement mentioned in it was duly inserted in the issue of the newspaper or the Gazette which is specified in the memorandum<sup>5</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 For the meaning of 'the Gazette' see para 171 note 5 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 7.32(1). As to the evidential value of notices in the Gazette, and as to the duties to cause further gazetting in the event of a variation of an order, error or inaccuracy, see para 787 post.

4 Ibid r 7.32(2). For the meaning of 'file in court' see para 95 note 10 ante.

5 Ibid r 7.32(3).

## **UPDATE**

## **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **780 Filing of Gazette notices and advertisements**

TEXT AND NOTES--SI 1986/1925 r 7.32 revoked: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION/781. Office copies of documents.

### **781. Office copies of documents.**

Any person who<sup>1</sup> has the right to inspect the court file of insolvency proceedings<sup>2</sup> may require the court to provide him with an office copy of any document from the file<sup>3</sup>; and a person's rights under this provision may be exercised on his behalf by his solicitor<sup>4</sup>. An office copy so provided by the court must be in such form as the registrar<sup>5</sup> thinks appropriate, and must bear the court's seal<sup>6</sup>.

1    le under the Insolvency Rules 1986, SI 1986/1925 (as amended): see para 779 ante.

2    For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

3    Insolvency Rules 1986, SI 1986/1925, r 7.61(1). As to the fee payable where this right is exercised see para 783 post.

4    Ibid r 7.61(2). For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

5    For the meaning of 'the registrar' see para 764 note 3 ante.

6    Insolvency Rules 1986, SI 1986/1925, r 7.61(3).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **781 Office copies of documents**

NOTE 4--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND

PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION/782. Confidentiality of documents.

## **782. Confidentiality of documents.**

Where in insolvency proceedings<sup>1</sup> the responsible insolvency practitioner<sup>2</sup> considers, in the case of a document forming part of the records of the insolvency, that:

- 1014 (1) it should be treated as confidential; or
- 1015 (2) it is of such a nature that its disclosure would be calculated to be injurious to the interests of the insolvent's creditors,

he may decline to allow it to be inspected by a person who would otherwise be entitled to inspect it<sup>3</sup>. The persons to whom the insolvency practitioner may so refuse inspection include the members of a creditors' committee<sup>4</sup>.

Where the insolvency practitioner determines so to refuse inspection of a document, the person wishing to inspect it may apply to the court for that determination to be overruled; and the court may either overrule it altogether, or sustain it subject to such conditions, if any, as it thinks fit to impose<sup>5</sup>.

Nothing in the above provisions, however, entitles the insolvency practitioner to decline to allow the inspection of any proof or proxy<sup>6</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 12.13(1).

4 Ibid r 12.13(2).

5 Ibid r 12.13(3). As to appeals see para 739 et seq ante; and as to the mode of application and the procedure see para 764 et seq ante.

6 Ibid r 12.13(4) (added by SI 1987/1919).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION/783. Right to copy documents.

## **783. Right to copy documents.**

Where a right is conferred<sup>1</sup> on any person to inspect documents, the right includes that of taking copies of those documents, on payment, in the case of documents on the court's file of proceedings, of the prescribed fee chargeable<sup>2</sup>, and otherwise, of the appropriate fee<sup>3</sup>.

Where the responsible insolvency practitioner<sup>4</sup> or the official receiver is requested by a creditor or member of a creditors' committee to supply copies of any documents, he is entitled to require the payment of the appropriate fee in respect of the supply of the documents<sup>5</sup>.

1    le under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

2    le under any order made under the Supreme Court Act 1981 s 130 or the County Courts Act 1984 s 128; and see CIVIL PROCEDURE vol 11 (2009) PARA 87.

3    Insolvency Rules 1986, SI 1986/1925, r 12.15 (amended by SI 1987/1919). For these purposes, 'the appropriate fee' means 15 pence per A4 or A5 page, and 30 pence per A3 page: Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.11(b).

4    For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

5    Insolvency Rules 1986, SI 1986/1925, r 12.15A (added by SI 1987/1919).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 783 Right to copy documents

NOTE 2--The prescribed fee is now chargeable under any order made under the Courts Act 2003 s 92: SI 1986/1925 r 12.15 (amended by SI 2005/527).

Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION/784. Right to have list of creditors.

### 784. Right to have list of creditors.

In any proceedings in bankruptcy, a creditor who, under the Insolvency Rules 1986<sup>1</sup>, has the right to inspect documents on the court file<sup>2</sup> also has the right to require the responsible insolvency practitioner<sup>3</sup> to furnish him with a list of the bankrupt's creditors and the amount of their respective debts, except where a statement of the bankrupt's affairs has been filed in court<sup>4</sup>. The insolvency practitioner, on being required by any person to furnish the list, must send it to him, but is entitled to charge the appropriate fee<sup>5</sup> for doing so<sup>6</sup>.

1    le the Insolvency Rules 1986, SI 1986/1925 (as amended).

2    le under *ibid* r 7.31: see para 779 ante.

3 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 12.17(1)(c), (2). As to the statement of affairs see para 244 et seq ante. For the meaning of 'file in court' see para 95 note 10 ante.

5 For the meaning of 'the appropriate fee' see para 783 note 3 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 12.17(3).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **784 Right to have list of creditors**

TEXT AND NOTES--SI 1986/1925 r 12.17 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/C. COURT RECORDS AND RETURNS; ACCESS TO INFORMATION/785. False claim of status as creditor etc.

### **785. False claim of status as creditor etc.**

Where provision is made<sup>1</sup> for creditors to have a right to inspect any documents, whether on the court's file or in the hands of a responsible insolvency practitioner<sup>2</sup> or other person, it is an offence for a person, with the intention of obtaining a sight of documents which he has no right to inspect, falsely to claim a status which would entitle him to inspect them<sup>3</sup>. A person guilty of an offence under these provisions is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>4</sup>.

1 Ie under the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 12.18(1).

4 Ibid rr 12.18(2), 12.21(1)-(4), Sch 5. For the meaning of 'the statutory maximum' see para 4 ante. The Insolvency Act 1986 s 431 has effect in relation to such an offence as it does to offences under the 1986 Act: Insolvency Rules 1986, SI 1986/1925, r 12.21(5). The Insolvency Act 1986 s 431 relates to summary proceedings against a body corporate: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 927. It does not apply to individual insolvency but it may apply in the case of insolvent partnerships. As to insolvent partnerships see para 817 et seq post.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 431 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

**UPDATE****725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/D. EVIDENCE/786. Admissibility in evidence of statement of affairs.

**D. EVIDENCE****786. Admissibility in evidence of statement of affairs.**

In any proceedings, whether or not under the Insolvency Act 1986, a statement of affairs prepared for the purpose of any provision of the Insolvency Act 1986 which is derived from the Insolvency Act 1985<sup>1</sup>, and any other statement made in pursuance of a requirement imposed by or under such a provision or by or under rules<sup>2</sup> made under the Insolvency Act 1986, may be used in evidence against any person making or concurring in making the statement<sup>3</sup>.

However, in criminal proceedings in which any such person is charged with a relevant offence<sup>4</sup> no evidence relating to the statement may be adduced, and no question relating to it may be asked, by or on behalf of the prosecution unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person<sup>5</sup>.

1 In the Insolvency Act 1986 s 272 (derived from the Insolvency Act 1985 s 122) (bankrupt's statement of affairs on debtor's petition: see para 252 ante); the Insolvency Act 1986 s 288 (derived from the Insolvency Act 1985 s 135) (bankrupt's statement of affairs on creditor's petition: see para 244 ante); the Insolvency Act 1986 s 291(4) (derived from the Insolvency Act 1985 s 138) (inventory and information to the official receiver: see para 243 ante); and the Insolvency Act 1986 s 333(1) (derived from the Insolvency Act 1985 s 169) (information to trustee: see para 345 ante).

2 See the Insolvency Rules 1986, SI 1986/1925, r 6.41 (statement of affairs on debtor's petition: see para 159 ante), r 6.66 (further disclosure by creditor to official receiver on creditor's petition, which the official receiver may require to be verified by affidavit: see para 251 ante) and r 6.72 (further disclosure by creditor to official receiver on debtor's petition, which the official receiver may require to be verified by affidavit: see para 255 ante).

3 Insolvency Act 1986 s 433(1) (renumbered by the Youth Justice and Criminal Evidence Act 1999 s 59, Sch 3 para 7(1), (2)). The statement may not be used in evidence against third parties or the trustee: *Re Brunner* (1887) 19 QBD 572; *New, Prance and Garrard's Trustee v Hunting* [1897] 1 QB 607; on appeal [1897] 2 QB 19, CA; affd sub nom *Sharp v Jackson* [1899] AC 419, HL.

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, the Insolvency Act 1986 s 433 (as amended) applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

4 For these purposes, a relevant offence is any offence other than:

124 (1) an offence under the Insolvency Act 1986 ss 22(6), 47(6), 48(8), 66(6), 67(8), 95(8), 98(6), 99(3)(a), 131(7), 192(2), 208(1)(a) or (d) or (2), 210, 235(5) (see COMPANY AND PARTNERSHIP

INSOLVENCY) or s 353(1) (see para 708 ante), s 354(1)(b) or (3) (see para 709 ante) or s 356(1) or (2)(a) (see para 715 ante) or s 396(1), Sch 7 para 4(3)(a) (see para 65 head (a) ante);

125 (2) an offence which:

14. (a) is created by rules made under the Insolvency Act 1986; and

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15. (b) is designated for these purposes by such rules or by regulations made by the Secretary of State;

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126 (3) an offence which is created by regulations made under any such rules and designated for these purposes by such regulations;

127 (4) an offence under the Perjury Act 1911 ss 1, 2 or 5 (false statements made on oath or made otherwise than on oath: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 712 et seq);

128 (5) an offence under the Criminal Law (Consolidation) (Scotland) Act 1995 (false statements made on oath or otherwise than on oath):

Insolvency Act 1986 s 433(3) (added by the Youth Justice and Criminal Evidence Act 1999 Sch 3 para 7(1), (3)).

Any regulations under head (2)(b) supra must be made by statutory instrument and, after being made, must be laid before each House of Parliament: Insolvency Act s 433(4) (added by the Youth Justice and Criminal Evidence Act 1999 Sch 3 para 7).

5 Insolvency Act s 433(2) (added by the Youth Justice and Criminal Evidence Act 1999 Sch 3 para 7(1), (2)).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/D. EVIDENCE/787. Gazetting notices.

### 787. Gazetting notices.

A copy of the Gazette<sup>1</sup> containing any notice required by the Insolvency Act 1986 or the Insolvency Rules 1986<sup>2</sup> to be gazetted is evidence of any facts stated in the notice<sup>3</sup>.

In the case of an order of the court notice of which is required by the Insolvency Act 1986 or the Insolvency Rules 1986 to be gazetted, a copy of the Gazette containing the notice may in any proceedings be produced as conclusive evidence that the order was made on the date specified in the notice<sup>4</sup>.

Where an order of the court which is gazetted has been varied, and where any matter has been erroneously or inaccurately gazetted, the person whose responsibility it was to procure the requisite entry in the Gazette must forthwith cause the variation of the order to be gazetted or, as the case may be, a further entry to be made in the Gazette for the purpose of correcting the error or inaccuracy<sup>5</sup>.



- 1 For the meaning of 'the Gazette' see para 171 note 5 ante.
- 2 le the Insolvency Rules 1986, SI 1986/1925 (as amended).
- 3 Ibid r 12.20(1).
- 4 Ibid r 12.20(2). However, in the absence of proof of actual notice, gazetting does not amount to notice to all the world: *Fryer v Ewart* [1902] AC 187, HL; *Rooney v Cardona* [1999] 1 WLR 1388, [1999] BPIR 291, CA.
- 5 Insolvency Rules 1986, SI 1986/1925, r 12.20(3). As to the filing of Gazette notices by the court see r 7.32; and para 780 ante.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 787 Gazetting notices

TEXT AND NOTES--SI 1986/1925 r 12.20 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/D. EVIDENCE/788. Evidence of proceedings at meetings.

### 788. Evidence of proceedings at meetings.

A minute of proceedings at a meeting<sup>1</sup> of a person's creditors signed by a person describing himself as, or appearing to be, the chairman of that meeting is admissible in insolvency proceedings<sup>2</sup> without further proof<sup>3</sup>.

The minute is prima facie evidence that:

- 1016 (1) the meeting was duly convened and held;
- 1017 (2) all resolutions passed at the meeting were duly passed; and
- 1018 (3) all proceedings at the meeting duly took place<sup>4</sup>.

1 le a meeting held under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 12.5(1).

4 Ibid r 12.5(2). As to the requisite quorum see para 287 ante.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/D. EVIDENCE/789. Documents issuing from Secretary of State.

### **789. Documents issuing from Secretary of State.**

Any document purporting to be, or to contain, any order, directions or certificate issued by the Secretary of State must be received in evidence and is deemed to be or, as the case may be, contain that order or certificate, or those directions, without further proof, unless the contrary is shown<sup>1</sup>; and this provision applies whether the document is signed by the Secretary of State himself or an officer on his behalf<sup>2</sup>.

Without prejudice to the above provisions, a certificate signed by the Secretary of State or an officer on his behalf and confirming:

- 1019 (1) the making of any order;
- 1020 (2) the issuing of any document; or
- 1021 (3) the exercise of any discretion, power or obligation arising or imposed under the Insolvency Act 1986 or the Insolvency Rules 1986,

is conclusive evidence of the matters dealt with in the certificate<sup>3</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 12.6(1).

2 Ibid r 12.6(2).

3 Ibid r 12.6(3).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/D. EVIDENCE/790. Affidavits.

### **790. Affidavits.**

Subject to the following provisions, the practice and procedure of the High Court with regard to affidavits, their form and contents, and the procedure governing their use, are to apply to all insolvency proceedings<sup>1</sup>.

Where in insolvency proceedings an affidavit is made by the official receiver or the responsible insolvency practitioner<sup>2</sup>, the deponent must state the capacity in which he makes it, the position which he holds, and the address at which he works<sup>3</sup>. Notwithstanding the provisions<sup>4</sup> whereby an affidavit is not to be sworn before a party's own solicitor, a creditor's affidavit of debt<sup>5</sup> may be sworn before his own solicitor<sup>6</sup>; and the official receiver, any deputy official receiver, or any officer of the court duly authorised in that behalf, may take affidavits and declarations<sup>7</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 7.57(1) (substituted by SI 1999/1022). As to the rules and practice referred to see CPR Pt 32; and CIVIL PROCEDURE. For the meaning of 'insolvency proceedings' see para 35 note 4 ante. As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 post.

2 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 7.57(2) (substituted by SI 1999/1022).

4 *le Practice Direction-Written Evidence* (2001) PD 32 para 9.2: see CIVIL PROCEDURE vol 11 (2009) PARA 990.

5 See para 165 ante.

6 Insolvency Rules 1986, SI 1986/1925, r 7.57(3) (substituted by SI 1999/1022).

7 Insolvency Rules 1986, SI 1986/1925, r 7.57(4) (substituted by SI 1999/1022).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 790 Affidavits

TEXT AND NOTES--SI 1986/1925 r 7.57 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/D. EVIDENCE/791. Use of affidavit evidence.

### 791. Use of affidavit evidence.

In any proceedings, evidence may be given by affidavit unless by any provision of the Insolvency Rules 1986<sup>1</sup> it is otherwise provided or the court otherwise directs; but the court may, on the application of any party, order the attendance for cross-examination of the person making the affidavit<sup>2</sup>. Where, after such an order has been made, the person in question does not attend, his affidavit may not be used in evidence without the permission of the court<sup>3</sup>.

1 le the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 Ibid r 7.7(1). As to the filing and service of affidavits see para 792 post; as to the filing of reports instead of affidavits see r 7.9 and para 794 post; and as to the use of witness statements instead of affidavits in insolvency proceedings see r 7.57(5), (6) (as substituted); and para 793 post.

3 Ibid r 7.7(2).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **791 Use of affidavit evidence**

TEXT AND NOTES--SI 1986/1925 r 7.7 substituted by r 7.7A: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/D. EVIDENCE/792. Filing and service of affidavits.

#### **792. Filing and service of affidavits.**

Unless the provision of the Insolvency Act 1986 or the Insolvency Rules 1986<sup>1</sup> under which the application is made provides otherwise, or the court otherwise allows:

1022 (1) if the applicant intends to rely at the first hearing on affidavit evidence, he must file the affidavit or affidavits, if more than one, in court<sup>2</sup> and serve a copy or copies on the respondent, not less than 14 days before the date fixed for the hearing; and

1023 (2) where a respondent to an application intends to oppose it and to rely for that purpose on affidavit evidence, he must file the affidavit or affidavits, if more than one, in court and serve a copy or copies on the applicant, not less than seven days before the date fixed for the hearing<sup>3</sup>.

Any affidavit may be sworn by the applicant or by the respondent or by some other person possessing direct knowledge of the subject matter of the application<sup>4</sup>.

1 le the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 For the meaning of 'file in court' see para 95 note 10 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 7.8(1). As to the use of witness statements instead of affidavits in insolvency proceedings see r 7.57(5), (6) (as substituted) and para 793 post; and as to the use of reports instead of affidavits see r 7.9 and para 794 post.

4 Ibid r 7.8(2).

**UPDATE****725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/D. EVIDENCE/793. Witness statements.

**793. Witness statements.**

Unless otherwise provided<sup>1</sup>, where the Insolvency Rules 1986<sup>2</sup> provide for the use of an affidavit, a witness statement verified by a statement of truth may be used as an alternative<sup>3</sup>.

1 Witness statements may not be used under the Insolvency Rules 1986, SI 1986/1925, r 6.60 (statement of affairs: see para 246 ante), rr 6.66, 6.72 (further disclosure: see paras 251, 255 ante), rr 6.65, 6.70 (accounts: see paras 250, 252 ante), rr 6.96, 6.99 (claims: see paras 528, 531 ante) and rr 9.3, 9.4 (as amended) (examinations: see paras 310, 311 ante): r 7.57(6) (substituted by SI 1999/1022). Nor may witness statements be used under the Insolvency Rules 1986, SI 1986/1925, rr 2.12, 3.4, 4.33, 4.39, 4.40, 4.42, 4.73, 4.77 (see COMPANY AND PARTNERSHIP INSOLVENCY): r 7.57(6) (as so substituted).

2 I.e. the Insolvency Rules 1986, SI 1986/1925 (as amended).

3 Ibid r 7.57(5) (substituted by SI 1999/1022). Where the Insolvency Rules 1986, SI 1986/1925, r 7.57(5) (as so substituted) applies, any form prescribed by r 12.7 (as amended) (see para 755 ante) must be modified as necessary: r 7.57(7) (substituted by SI 1999/1022).

**UPDATE****725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

**793 Witness statements**

TEXT AND NOTES--SI 1986/1925 r 7.57 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/D. EVIDENCE/794. Use of reports.

**794. Use of reports.**

A report may be filed in court<sup>1</sup> instead of an affidavit in any case:

- 1024 (1) by the official receiver, whether or not he is acting in any capacity mentioned in head (2) below, or a deputy official receiver; or
- 1025 (2) unless the application involves other parties or the court otherwise orders, by a trustee in bankruptcy, an interim receiver, a special manager or an insolvency practitioner appointed<sup>2</sup> on a debtor's petition<sup>3</sup>.

In any case where a report is so filed instead of an affidavit, the report is to be treated for the purposes of any hearing before the court<sup>4</sup> as if it were an affidavit<sup>5</sup>.

Any report filed by the official receiver in accordance with the Insolvency Act 1986 or the Insolvency Rules 1986 is prima facie evidence<sup>6</sup> of any matter contained in it<sup>7</sup>.

1 For the meaning of 'file in court' see para 95 note 10 ante.

2 Ie under the Insolvency Act 1986 s 273(2): see para 200 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 7.9(1). As to the use of witness statements instead of affidavits in insolvency proceedings see r 7.57(5), (6) (as substituted); and para 793 ante.

4 Ie under ibid r 7.8(1): see para 792 ante.

5 Ibid r 7.9(2).

6 'Prima facie' evidence does not absolve the official receiver from having to prove his case when required to do so by other parties: *Re Oswald, ex p Board of Trade* (1892) 9 Morr 202. See also *Re ABC Coupler and Engineering Co Ltd (No 2)* [1962] 3 All ER 68, [1962] 1 WLR 1236; *Singh v Official Receiver* [1997] BPIR 530.

7 Insolvency Rules 1986, SI 1986/1925, r 7.9(3).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/D. EVIDENCE/795. Shorthand writers.

### 795. Shorthand writers.

In the High Court, the judge and, in a county court, the district judge may in writing nominate one or more persons to be official shorthand writers to the court<sup>1</sup>.

At any time in the course of insolvency proceedings<sup>2</sup>, the court may appoint a shorthand writer to take down the evidence of a person under examination<sup>3</sup>. Where the official receiver applies to the court for an order appointing a shorthand writer, he must name the person he proposes for appointment; and that appointment must be made, unless the court otherwise orders<sup>4</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 7.16(1); Courts and Legal Services Act 1990 s 74(1)(a). For the prescribed form of declaration to be given by the official shorthand writer see the Insolvency Rules 1986, SI 1986/1925, rr 7.16, 12.7(1), (2), Sch 4, Form 7.3. As to the remuneration of shorthand writers see para 306 ante.

2 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 7.16(2). The examination is under either the Insolvency Act 1986 s 290 (public examination: see para 291 et seq ante) or s 366 (private examination: see para 307 et seq ante); Insolvency Rules 1986, SI 1986/1925, r 7.16(2). For the prescribed form of appointment see Sch 4, Form 7.5.

4 Ibid r 7.16(3).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### 795 Shorthand writers

NOTE 3--SI 1986/1925 r 7.16(2) amended: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/E. SERVICE OF PROCEEDINGS AND NOTICES/796. General provisions as to service.

## ***E. SERVICE OF PROCEEDINGS AND NOTICES***

### **796. General provisions as to service.**

Subject to the provisions relating to service by post<sup>1</sup>, the normal rules about service<sup>2</sup> apply as regards any matter relating to the service of documents and the giving of notice in insolvency proceedings<sup>3</sup>.

1 Ie the Insolvency Rules 1986, SI 1986/1925, r 12.10 (as amended): see para 799 post.

2 Ie CPR Pt 6: see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq. The rules in CPR Pt 6 apply to service of documents except where any other enactment, a rule in another Part of the rules or a Practice Direction makes a different provision or where the court orders otherwise: see CPR 6.1; and CIVIL PROCEDURE vol 11 (2009) PARA 138. Except where the Insolvency Rules 1986, SI 1986/1925 (as amended) otherwise provide, service of documents in insolvency proceedings will be the responsibility of the parties and will not be undertaken by the court: *Practice Direction-Insolvency Proceedings* para 1.3.

3 Insolvency Rules 1986, SI 1986/1925, r 12.11 (substituted by SI 1999/1022). For the meaning of 'insolvency proceedings' see para 35 note 4 ante. As to service outside the jurisdiction see para 800 post; and as to the giving of notice see para 797 post.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **796 General provisions as to service**

TEXT AND NOTE 1--Also, subject to the provisions relating to service outside the jurisdiction (see PARA 800): SI 1986/1925 r 12.11 (amended by SI 2005/527).

NOTE 2--CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/E. SERVICE OF PROCEEDINGS AND NOTICES/797. Method of service and giving notice.

### **797. Method of service and giving notice.**

A reference in the Insolvency Rules 1986<sup>1</sup> to giving notice, or to delivering, sending or serving any document, means that the notice or document may be sent by post, unless under a particular rule personal service is expressly required<sup>2</sup>; and any form of post may be used, unless under a particular rule a specified form is expressly required<sup>3</sup>. Personal service of a document is permissible in all cases<sup>4</sup>.

Notice of the venue<sup>5</sup> fixed for an application<sup>6</sup> may be given by service<sup>7</sup> of the sealed copy of the application<sup>8</sup>.

Where under the Insolvency Act 1986 or the Insolvency Rules 1986 a notice or other document is required or authorised to be given to a person, it may, if he has indicated that his solicitor<sup>9</sup> is authorised to accept service on his behalf, be given instead to the solicitor<sup>10</sup>.

Where two or more persons are acting jointly as the responsible insolvency practitioner<sup>11</sup> in any proceedings, delivery of a document to one of them is to be treated as delivery to them all<sup>12</sup>.

1    Ie the Insolvency Rules 1986, SI 1986/1925 (as amended).

2    Ibid rr 13.1, 13.3(1).

3    Ibid rr 13.1, 13.3(2).

4    Ibid rr 13.1, 13.3(3).

5    For the meaning of 'venue' see para 84 note 21 ante.

6    See para 767 ante.

7    Ie under the Insolvency Rules 1986, SI 1986/1925, r 7.4(3): see para 767 ante.

8    Ibid rr 13.1, 13.3(4).

9    Ibid rr 13.1, 13.4.

10   For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

11   For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.



12 Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.5.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 797 Method of service and giving notice

NOTE 10--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/E. SERVICE OF PROCEEDINGS AND NOTICES/798. Notices.

### 798. Notices.

All notices required or authorised by or under the Insolvency Act 1986 or the Insolvency Rules 1986<sup>1</sup> to be given must be in writing, unless it is otherwise provided, or the court allows the notice to be given in some other way<sup>2</sup>.

Where in any proceedings a notice is required to be sent or given by the official receiver or by the responsible insolvency practitioner<sup>3</sup>, the sending or giving of it may be proved by means of a certificate, in the case of the official receiver, by him or a member of his staff, and in the case of the insolvency practitioner, by him, or his solicitor<sup>4</sup>, or a partner or an employee of either of them, that the notice was duly posted<sup>5</sup>.

In the case of a notice to be sent or given by a person other than the official receiver or insolvency practitioner, the sending or giving of it may be proved by means of a certificate by that person that he posted the notice, or instructed another person, naming him, to do so<sup>6</sup>.

A certificate under the above provisions may be indorsed on a copy or specimen of the notice to which it relates<sup>7</sup>.

1 le the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 Ibid r 12.4(1).

3 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

4 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

5 Insolvency Rules 1986, SI 1986/1925, r 12.4(2).

6 Ibid r 12.4(3).

7 Ibid r 12.4(4).

**UPDATE****725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

**798 Notices**

TEXT AND NOTES--SI 1986/1925 r 12.4 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/E. SERVICE OF PROCEEDINGS AND NOTICES/799. Service by post.

**799. Service by post.**

For a document to be properly served by post, it must be contained in an envelope addressed to the person on whom service is to be effected, and prepaid for either first- or second-class post<sup>1</sup>. A document to be served by post may be sent to the last known address of the person to be served<sup>2</sup>.

Where first-class post is used, the document is treated as served on the second business day<sup>3</sup> after the date of posting, unless the contrary is shown<sup>4</sup>; and, where second-class post is used, the document is treated as served on the fourth business day after the date of posting, unless the contrary is shown<sup>5</sup>. The date of posting is presumed, unless the contrary is shown, to be the date shown in the post-mark on the envelope in which the document is contained<sup>6</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 12.10(1). As to the rules relating to service of statutory demands see para 156 ante; and as to the rules relating to the service of petitions see para 171 ante.

2 Ibid r 12.10(1A) (added by SI 1987/1919). Where there is no last known address and no solicitor is acting for the party to be served, the normal rules as to place of service in CPR 6.5(6) (see CIVIL PROCEDURE vol 11 (2009) PARA 143) will apply: Insolvency Rules 1986, SI 1986/1925, r 12.11 (substituted by SI 1999/1022).

3 For the meaning of 'business day' see para 95 note 11 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 12.10(2).

5 Ibid r 12.10(3).

6 Ibid r 12.10(4).

**UPDATE****725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/E. SERVICE OF PROCEEDINGS AND NOTICES/800. Service outside the jurisdiction.

### **800. Service outside the jurisdiction.**

The normal rules and practice applicable to service out of the jurisdiction<sup>1</sup> do not apply in insolvency proceedings<sup>2</sup>. A bankruptcy petition may, with the permission of the court, be served outside England and Wales in such manner as the court may direct<sup>3</sup>.

Where for the purposes of insolvency proceedings<sup>4</sup> any process or order of the court, or other document<sup>5</sup>, is required to be served on a person who is not in England and Wales, the court may order service to be effected within such time, on such person, at such place and in such manner as it thinks fit, and may also require such proof of service as it thinks fit<sup>6</sup>.

An application<sup>7</sup> for such an order must be supported by an affidavit<sup>8</sup> stating the grounds on which the application is made, and in what place or country the person to be served is, or probably may be found<sup>9</sup>.

1    Ie CPR Sch 1, RSC Ord 11.

2    Insolvency Rules 1986, SI 1986/1925, r 12.12(1) (substituted by SI 1999/1022).

3    Insolvency Rules 1986, SI 1986/1925, r 12.12(2).

4    For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

5    A statutory demand is not a document issued by the court, and, therefore, permission of the court to serve out of the jurisdiction is not required: see *Practice Direction-Insolvency Proceedings* para 10.1; and para 156 ante.

6    Insolvency Rules 1986, SI 1986/1925, r 12.12(3). For the practice as to service out of the jurisdiction see *Re Seagull Manufacturing Co Ltd (in liquidation)* [1993] Ch 345, [1993] 2 All ER 980, CA; *Re Paramount Airways Ltd (in administration)* [1993] Ch 223, [1992] 3 All ER 1, CA (court must be satisfied that there is a real issue between the parties which it is reasonable that the court should decide and that there is a sufficient connection with the jurisdiction).

7    As to the mode of application and the procedure see para 764 et seq ante.

8    As to the use of witness statements instead of affidavits in insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, r 7.57(5), (6) (as substituted); and para 793 ante.

9    Ibid r 12.12(4).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **800 Service outside the jurisdiction**

NOTE 1--Now CPR 6.17-6.35 (service of process, etc, out of the jurisdiction) (see CIVIL PROCEDURE vol 11 (2009) PARA 156 et seq): SI 1986/1925 r 12.12(1) (amended by SI 2005/527).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/E. SERVICE OF PROCEEDINGS AND NOTICES/801. Notices sent simultaneously to the same person.

### **801. Notices sent simultaneously to the same person.**

Where under the Insolvency Act 1986 or the Insolvency Rules 1986<sup>1</sup> a document of any description is to be sent to a person, whether or not as a member of a class of persons to whom that same document is to be sent, it may be sent as an accompaniment to any other document or information which the person is to receive, with or without modification or adaptation of the form applicable to that document<sup>2</sup>.

1    Ie the Insolvency Rules 1986, SI 1986/1925 (as amended).

2    Ibid r 12.14.

### **UPDATE**

#### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/E. SERVICE OF PROCEEDINGS AND NOTICES/802. Non-receipt of notice of meeting.

### **802. Non-receipt of notice of meeting.**

Where a meeting of creditors or other persons is summoned by notice<sup>1</sup>, the meeting is presumed to have been duly summoned and held, notwithstanding that not all those to whom the notice is to be given have received it<sup>2</sup>.

1    Ie in accordance with the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

2    Ibid r 12.16.

### **UPDATE**

#### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/E. SERVICE OF PROCEEDINGS AND NOTICES/803. Service of order staying concurrent proceedings and remedies.

### **803. Service of order staying concurrent proceedings and remedies.**

Where in insolvency proceedings<sup>1</sup> the court makes an order staying any action, execution or other legal process against the property or person of an individual debtor or bankrupt<sup>2</sup>, service of the order may be effected by sending a sealed copy of the order to whatever is the address for service of the claimant or other party having the carriage of the proceedings to be stayed<sup>3</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 In relation to bankruptcy see para 730 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 7.56. As to service by post see para 799 ante.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/E. SERVICE OF PROCEEDINGS AND NOTICES/804. Notices where execution overtaken by individual's insolvency.

### **804. Notices where execution overtaken by individual's insolvency.**

Where execution has been taken out against property of a judgment debtor, and notice is given to the sheriff or other officer charged with the execution<sup>1</sup>, such notice must be in writing and be delivered by hand at, or sent by recorded delivery to, the office of the under-sheriff or, as the case may be, of the officer charged with the execution<sup>2</sup>.

1 I.e. under the Insolvency Act 1986 s 346(2) that the judgment debtor has been adjudged bankrupt (see para 679 ante), or under s 346(3)(b) that a bankruptcy petition has been presented in respect of him (see para 678 head (b) ante).

2 Insolvency Rules 1986, SI 1986/1925, r 12.19(1)(c), (d), (2). Where the execution is in a county court, and the officer in charge of it is the district judge of that court, then, if: (1) there is filed in that court in respect of

the judgment debtor a bankruptcy petition; or (2) there is made by that court in respect of him a bankruptcy order or an order appointing an interim receiver, the Insolvency Act 1986 s 346 is deemed satisfied as regards the requirement of a notice to be served on, or given to, the officer in charge of the execution: Insolvency Rules 1986, SI 1986/1925, r 12.19(3); Courts and Legal Services Act 1990 s 74(1)(a).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **804 Notices where execution overtaken by individual's insolvency**

TEXT AND NOTES--SI 1986/1925 r 12.19 revoked: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/F. COSTS AND DETAILED ASSESSMENT/805. General principles.

## ***F. COSTS AND DETAILED ASSESSMENT***

### **805. General principles.**

The normal rules about costs in the High Court and in a county court<sup>1</sup> apply, with any necessary modifications, to the insolvency proceedings<sup>2</sup>, subject to any provision to inconsistent effect referred to in the following provisions<sup>3</sup>.

In the High Court and any county court, subject to the provisions of the Supreme Court Act 1981 or any other enactment and to rules of court, the costs of and incidental to all proceedings are in the discretion of the court<sup>4</sup>, and the court has full power to determine by whom and to what extent the costs are to be paid<sup>5</sup>.

1    Ie CPR Pt 43 (scope of costs rules and definitions), CPR Pt 44 (general rules about costs), CPR Pt 45 (fixed costs), Pt 47 (procedure for detailed assessment of costs and default provisions) and Pt 48 (costs; special cases): see CIVIL PROCEDURE.

2    For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

3    Insolvency Rules 1986, SI 1986/1925, r 7.33 (substituted by SI 1999/1022). The provisions referred to are the Insolvency Rules 1986, SI 1986/1925, rr 7.34-7.42 (as amended) (see paras 807-814 post): r 7.33 (as so amended).

4    Supreme Court Act 1981 s 51(1) (substituted by the Courts and Legal Services Act 1990 s 4(1)); CPR r 44.3(1). As to the priority of costs in bankruptcy see para 574 ante.

5    Supreme Court Act 1981 s 51(3) (substituted by the Courts and Legal Services Act 1990 s 4(1)). As to costs orders in favour of or against non-parties see CPR 48.2.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **805 General principles**

TEXT AND NOTES 1-3--SI 1986/1925 r 7.33 substituted by r 7.33A: SI 2010/686.

TEXT AND NOTES 4, 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/F. COSTS AND DETAILED ASSESSMENT/806. Costs of proving debts.

### **806. Costs of proving debts.**

Unless the court otherwise orders, every creditor bears the cost of proving his own debt, including such as may be incurred in providing documents or evidence<sup>1</sup> the production of which is required by the trustee, or the convener or chairman of any meeting, where he thinks it necessary for the purpose of substantiating the whole or any part of the claim made in the proof<sup>2</sup>.

Unless the court otherwise orders, costs incurred by the trustee in estimating the value of a bankruptcy debt<sup>3</sup> which, by reason of its being subject to any contingency or contingencies or for any other reason, does not bear a certain value, fall on the estate, as an expense of the bankruptcy<sup>4</sup>.

1    Ie under the Insolvency Rules 1986, SI 1986/1925, r 6.98(3): see para 530 ante.

2    Ibid r 6.100(1), (3).

3    Ie under the Insolvency Act 1986 s 322(3): see para 540 ante.

4    Insolvency Rules 1986, SI 1986/1925, r 6.100(2), (3).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/F. COSTS AND DETAILED ASSESSMENT/807. Requirement to assess costs by detailed procedure.

### **807. Requirement to assess costs by detailed procedure.**

Subject to the following provisions, where the costs, charges or expenses of any person are payable out of the insolvent estate<sup>1</sup>, the amount of those costs, charges or expenses must be decided by detailed assessment unless agreed between the responsible insolvency practitioner<sup>2</sup> and the person entitled to payment; and, in the absence of such agreement, the responsible insolvency practitioner may serve notice in writing requiring that person to commence detailed assessment proceedings<sup>3</sup> in the court to which the insolvency proceedings are allocated<sup>4</sup>.

If a creditors' committee established in insolvency proceedings resolves that the amount of any such costs, charges or expenses should be decided by detailed assessment, the insolvency practitioner must require detailed assessment<sup>5</sup>.

Where the amount of the costs, charges or expenses of any person employed by an insolvency practitioner in insolvency proceedings are required to be decided by detailed assessment or fixed by order of the court, this does not preclude the insolvency practitioner from making payments on account to such person on the basis of an undertaking by that person to repay immediately any money which may, when detailed assessment is made, prove to have been overpaid, with interest at the specified rate<sup>6</sup> on the date payment was made for the period from the date of payment to that of repayment<sup>7</sup>.

In any proceedings before the court, including proceedings on a petition, the court may order costs to be decided by detailed assessment<sup>8</sup>.

Unless otherwise directed or authorised, the costs of a trustee in bankruptcy are to be allowed on the standard basis<sup>9</sup>.

Where a sheriff is required to deliver up goods<sup>10</sup> or money or has deducted costs<sup>11</sup> from the proceeds of an execution or money paid to him, the insolvency practitioner may require that the sheriff's bill of costs be decided by detailed assessment<sup>12</sup>.

1 For the meaning of 'the insolvent estate' see para 91 note 18 ante.

2 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

3 Ie in accordance with CPR Pt 47 (procedure for detailed assessment of costs and default provisions): see CIVIL PROCEDURE VOL 12 (2009) PARA 1747.

4 Insolvency Rules 1986, SI 1986/1925, r 7.34(1) (substituted by SI 1999/1022). For the meaning of 'insolvency proceedings' see para 35 note 4 ante. The Insolvency Rules 1986, SI 1986/1925, r 7.34 (as substituted) applies additionally, with any necessary modifications, to bankruptcy proceedings commenced before 29 December 1986: rr 0.1, 7.34(6) (substituted by SI 1999/1022).

5 Insolvency Rules 1986, SI 1986/1925, r 7.34(2) (substituted by SI 1999/1022).

6 Ie at the rate specified in the Judgments Act 1838 s 17 (as amended): see FINANCIAL SERVICES AND INSTITUTIONS VOL 49 (2008) PARA 1307.

7 Insolvency Rules 1986, SI 1986/1925, r 7.34(3) (substituted by SI 1999/1022).

8 Insolvency Rules 1986, SI 1986/1925, r 7.34(4) (substituted by SI 1999/1022).

9 Insolvency Rules 1986, SI 1986/1925, r 7.34(5) (substituted by SI 1999/1022). Provision for the standard basis is made in CPR 44.4 (basis of assessment) and CPR 44.5 (factors to be taken into account in dealing with the amount of costs) (see CIVIL PROCEDURE): Insolvency Rules 1986, SI 1986/1925, r 7.34(5) (as so substituted).

10 Ie under the Insolvency Act 1986 s 346(2): see para 679 ante.

11 Ie under ibid s 346(3): see para 678 ante.

12 See the Insolvency Rules 1986, SI 1986/1925, r 7.36(1) (as substituted); and para 680 ante.

## UPDATE



## **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **807 Requirement to assess costs by detailed procedure**

TEXT AND NOTES--SI 1986/1925 r 7.34 substituted by r 7.34A: SI 2010/686.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/F. COSTS AND DETAILED ASSESSMENT/808. Procedure where detailed assessment required.

### **808. Procedure where detailed assessment required.**

Before making a detailed assessment of the costs of any person employed in insolvency proceedings<sup>1</sup> by a responsible insolvency practitioner<sup>2</sup>, the costs officer must require a certificate of employment, which must be indorsed on the bill and signed by the insolvency practitioner<sup>3</sup>. The certificate must include the name and address of the person employed, details of the functions to be carried out under the employment, and a note of any special terms of remuneration which have been agreed<sup>4</sup>.

Every person whose costs are required to be decided by detailed assessment in insolvency proceedings must, on being required in writing to do so by the insolvency practitioner, commence detailed assessment proceedings<sup>5</sup>. If that person does not commence detailed assessment proceedings within three months of that requirement or within such further time as the court, on application, may permit, the insolvency practitioner may deal with the bankrupt's estate<sup>6</sup> or, as the case may be, the debtor's property without regard to any claim by that person, whose claim is forfeited by such a failure to commence proceedings<sup>7</sup>; and, where, in any such case, such a claim lies additionally against an insolvency practitioner in his personal capacity, that claim is also forfeited by such a failure to commence proceedings<sup>8</sup>.

Where costs have been incurred in insolvency proceedings in the High Court and those proceedings are subsequently transferred to a county court, all costs of those proceedings directed by the court or otherwise required to be assessed may nevertheless, on the application of the person who incurred the costs, be ordered to be decided by detailed assessment in the High Court<sup>9</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 7.35(1) (substituted by SI 1999/1022).

4 Insolvency Rules 1986, SI 1986/1925, r 7.35(2) (substituted by SI 1999/1022).

5 Insolvency Rules 1986, SI 1986/1925, r 7.35(3) (substituted by SI 1999/1022). Detailed assessment proceedings means proceedings in accordance with CPR Pt 47 (procedure for detailed assessment of costs and default provisions: see CIVIL PROCEDURE vol 12 (2009) PARA 1779 et seq): Insolvency Rules 1986, SI 1986/1925, r 7.35(3) (as so substituted).

6 For the meaning of 'the bankrupt's estate' see para 216 ante.

7 Insolvency Rules 1986, SI 1986/1925, rr 7.35(4) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, rr 13.1, 13.8(b). As to the mode of application and the procedure see para 764 et seq ante.

8 Ibid r 7.35(5) (substituted by SI 1999/1022).

9 Insolvency Rules 1986, SI 1986/1925, r 7.35(6) (substituted by SI 1999/1022). As to the power to transfer see para 734 ante.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/F. COSTS AND DETAILED ASSESSMENT/809. Petitions presented by insolvents.

#### **809. Petitions presented by insolvents.**

In any case where a petition is presented by an individual ('the insolvent') against himself, any solicitor<sup>1</sup> acting for the insolvent must in his bill of costs give credit for any sum or security received from the insolvent as a deposit on account of the costs and expenses to be incurred in respect of the filing and prosecution of the petition; and the deposit must be noted by the costs officer on the final costs certificate<sup>2</sup>.

Where a petition is presented by a person other than the insolvent to whom the petition relates and, before it is heard, the insolvent presents a petition for the same order, and that order is made, then, unless the court considers that the insolvent estate<sup>3</sup> has benefited by the individual's conduct, or that there are otherwise special circumstances justifying the allowance of costs, no costs are to be allowed to the individual or his solicitor out of the insolvent estate<sup>4</sup>.

1 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

2 Insolvency Rules 1986, SI 1986/1925, r 7.37(1) (substituted by SI 1999/1022).

3 For the meaning of 'the insolvent estate' see para 91 note 18 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 7.37(2), (3) (substituted by SI 1999/1022).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **809 Petitions presented by insolvents**

TEXT AND NOTES--SI 1986/1925 r 7.37 substituted by r 7.37A: SI 2010/686.

NOTE 1--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/F. COSTS AND DETAILED ASSESSMENT/810. Costs paid otherwise than out of the insolvent estate.

### **810. Costs paid otherwise than out of the insolvent estate.**

Where the amount of costs is decided by detailed assessment under an order of the court directing that the costs are to be paid otherwise than out of the insolvent estate<sup>1</sup>, the costs officer must note on the final costs certificate by whom, or the manner in which, the costs are to be paid<sup>2</sup>.

1 For the meaning of 'the insolvent estate' see para 91 note 18 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.38 (substituted by SI 1999/1022).

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/F. COSTS AND DETAILED ASSESSMENT/811. Award of costs against official receiver or responsible insolvency practitioner.

### **811. Award of costs against official receiver or responsible insolvency practitioner.**

Without prejudice to any provision of the Insolvency Act 1986 or the Insolvency Rules 1986<sup>1</sup> by virtue of which the official receiver is not in any event to be liable for costs and expenses<sup>2</sup>, where the official receiver or a responsible insolvency practitioner<sup>3</sup> is made a party to any proceedings on the application of another party to the proceedings, he is not personally liable for costs, unless the court otherwise directs<sup>4</sup>.

1 Ie the Insolvency Rules 1986, SI 1986/1925 (as amended).

2 See para 41 ante.

3 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

4 Insolvency Rules 1986, SI 1986/1925, r 7.39 (substituted by SI 1999/1022). See also *Re Mordant (a bankrupt)*, *Mordant v Halls* [1996] BPIR 302, CA.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/F. COSTS AND DETAILED ASSESSMENT/812. Late applications for costs.

#### 812. Late applications for costs.

Where a party to, or person affected by, any proceedings in an insolvency applies to the court for an order allowing his costs, or part of them, incidental to the proceedings, and that application is not made at the time of the proceedings, the person concerned must serve a sealed copy of his application on the responsible insolvency practitioner<sup>1</sup>, and, in a bankruptcy, on the official receiver<sup>2</sup>.

The insolvency practitioner, and where appropriate, the official receiver may appear on the application<sup>3</sup>.

No costs of or incidental to the application are to be allowed to the applicant unless the court is satisfied that the application could not have been made at the time of the proceedings<sup>4</sup>.

1 For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.

2 Insolvency Rules 1986, SI 1986/1925, r 7.40(1), (2) (substituted by SI 1999/1022). As to the mode of application and the procedure see para 764 et seq ante.

3 Insolvency Rules 1986, SI 1986/1925, r 7.40(3) (substituted by SI 1999/1022).

4 Insolvency Rules 1986, SI 1986/1925, r 7.40(4) (substituted by SI 1999/1022).

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### 812 Late applications for costs

TEXT AND NOTES 1-3--SI 1986/1925 r 7.40(1)-(3) now r 7.40(1)-(3A) (substituted by SI 2009/642).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/F. COSTS AND DETAILED ASSESSMENT/813. Costs and expenses of witnesses.

### **813. Costs and expenses of witnesses.**

Except as directed by the court, no allowance as a witness in any examination or other proceedings before the court may be made to the bankrupt<sup>1</sup>. A person presenting any petition in insolvency proceedings<sup>2</sup> is not to be regarded as a witness on the hearing of the petition; but the costs officer may allow his expenses of travelling and subsistence<sup>3</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 7.41(1) (substituted by SI 1999/1022).

2 For the meaning of 'insolvency proceedings' see para 35 note 3 ante.

3 Insolvency Rules 1986, SI 1986/1925, r 7.41(2) (substituted by SI 1999/1022).

#### **UPDATE**

#### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

#### **813 Costs and expenses of witnesses**

TEXT AND NOTES--SI 1986/1925 r 7.41 amended: SI 2009/642.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/F. COSTS AND DETAILED ASSESSMENT/814. Final costs certificate.

### **814. Final costs certificate.**

A final costs certificate of the costs officer is final and conclusive as to all matters which have not been objected to in the manner provided for under the rules of the court<sup>1</sup>. Where it is proved to the satisfaction of a costs officer that a final costs certificate has been lost or destroyed, he may issue a duplicate<sup>2</sup>.

1 Insolvency Rules 1986, SI 1986/1925, r 7.42(1) (substituted by SI 1999/1022).

2 Insolvency Rules 1986, SI 1986/1925, r 7.42(2) (substituted by SI 1999/1022).

#### **UPDATE**

## **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(17) PRACTICE AND PROCEDURE IN INSOLVENCY PROCEEDINGS/(v) Miscellaneous Practice and Procedure/G. PERSONS INCAPABLE OF MANAGING THEIR AFFAIRS/815. Persons incapable of managing their affairs.

### ***G. PERSONS INCAPABLE OF MANAGING THEIR AFFAIRS***

#### **815. Persons incapable of managing their affairs.**

Where in insolvency proceedings<sup>1</sup> it appears to the court that a person affected by the proceedings is one who is incapable of managing and administering his property and affairs either by reason of mental disorder<sup>2</sup>, or due to physical affliction or disability (the 'incapacitated person'<sup>3</sup>), the court may appoint such person as it thinks fit to appear for, represent or act for the incapacitated person<sup>4</sup>. The appointment may be made either generally or for the purpose of any particular application or proceeding, or for the exercise of particular rights or powers which the incapacitated person might have exercised but for his incapacity<sup>5</sup>.

The court may make the appointment either of its own motion or on application by:

- 1026 (1) a person who has been appointed by a court in the United Kingdom or elsewhere to manage the affairs of, or to represent, the incapacitated person; or
- 1027 (2) any relative or friend of the incapacitated person who appears to the court to be a proper person to make the application; or
- 1028 (3) the official receiver; or
- 1029 (4) the person who, in relation to the proceedings, is the responsible insolvency practitioner<sup>6</sup>.

Such an application may be made without notice being served on any other party; but the court may require such notice of the application as it thinks necessary to be given to the person alleged to be incapacitated, or any other person, and may adjourn the hearing of the application to enable the notice to be given<sup>7</sup>. The application must be supported by an affidavit<sup>8</sup> of a registered medical practitioner as to the mental or physical condition of the incapacitated person, unless the application is made by the official receiver, in which case a report made by him is sufficient<sup>9</sup>.

Any notice served on, or sent to, a person appointed to act for the incapacitated person has the same effect as if it had been served on, or given to, the incapacitated person<sup>10</sup>.

1 For the meaning of 'insolvency proceedings' see para 35 note 4 ante.

2 ie within the meaning of the Mental Health Act 1983: see MENTAL HEALTH vol 30(2) (Reissue) para 402.

3 Insolvency Rules 1986, SI 1986/1925, r 7.43(1), (2).

4 Ibid rr 7.43(1), 7.44(1). For the prescribed form of order appointing a person to act for an incapacitated person see rr 7.44, 12.7(1), (2), Sch 4, Form 7.19.

- 5 Ibid r 7.44(2).
- 6 Ibid r 7.44(3). For the meaning of 'the responsible insolvency practitioner' see para 21 note 6 ante.
- 7 Ibid r 0.2(2) (substituted by SI 1999/1022); Insolvency Rules 1986, SI 1986/1925, r 7.44(4). As to the mode of application and the procedure see para 764 et seq ante.
- 8 As to the use of witness statements instead of affidavits in insolvency proceedings see ibid r 7.57(5), (6) (as substituted); and para 793 ante.
- 9 Ibid r 7.45(1), (2). As to the use of reports see also para 794 ante.
- 10 Ibid r 7.46. As to service generally see para 796 et seq ante.

## **UPDATE**

### **725-816 Practice and procedure in insolvency proceedings**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **815 Persons incapable of managing their affairs**

NOTES 3, 4--SI 1986/1925 r 7.43(1) amended: SI 2007/1898.

NOTE 4--SI 1986/1925 Sch 4 Form 7.19 revoked: SI 2010/686.

NOTE 7--SI 1986/1925 r 0.2(2) revoked: SI 2010/686.

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## **H. FEES**

### **816. Fees orders.**

In the Supreme Court, certain fees are prescribed by the Supreme Court Fees Order 1999, which extends to fees in insolvency proceedings before the High Court<sup>1</sup>; and in the county courts certain fees are prescribed by the County Court Fees Order 1999<sup>2</sup>.

Fees orders<sup>3</sup> are in force made under statutory power conferred on the Lord Chancellor to direct, with the sanction of the Treasury, that fees be paid in respect of proceedings under the Insolvency Act 1986 in relation to individual insolvency<sup>4</sup> and of the performance by the official receiver or the Secretary of State of functions under these provisions, and under the power conferred on the Treasury to direct by whom and in what manner the fees are to be collected and accounted for<sup>5</sup>. The Lord Chancellor may also, with the sanction of the Treasury, by order provide for sums to be deposited, by such persons, in such manner and in such circumstances as may be specified in the order, by way of security for such fees and fees payable to any person who has prepared<sup>6</sup> an insolvency practitioner's report in respect of the debtor<sup>7</sup>. An order made under these powers may contain such incidental, supplemental and transitional provisions as may appear to the Lord Chancellor, or, as the case may be, the Treasury,

necessary or expedient<sup>8</sup>. These special fee orders prescribe, subject to limits on certain fees<sup>9</sup>, certain fees and percentages to be charged by the official receiver, or by the Secretary of State<sup>10</sup>.

1 See the Supreme Court Fees Order 1999, SI 1999/687, Sch 1, Fee 6.

2 See the County Court Fees Order 1999, SI 1999/689, Sch 1, Fee 8.

3 See the Insolvency Fees Order 1986, SI 1986/2030 (amended by SI 1988/95, SI 1991/496; SI 1992/34; SI 1994/2451; SI 2001/761).

4 See the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

5 Ibid s 415(1), (2). Nothing in s 415 prejudices any power to make rules of court: s 415(7). As to the application of s 415 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 39 note 2 ante.

6 See under ibid s 274: see para 202 ante.

7 Ibid s 415(3).

8 Ibid s 415(4). Orders under these provisions must be made by statutory instrument and, after being made, must be laid before each House of Parliament: s 415(5). Fees payable by virtue of these provisions must be paid into the Consolidated Fund: s 415(6). All money received by the Secretary of State in respect of proceedings under the Insolvency Act 1986 must be paid into the Insolvency Services Account: see s 403(1); and para 26 ante. As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 711.

9 See subject to the Insolvency Fees Order 1986, SI 1986/2030, art 4A (added by SI 1994/2541).

10 Insolvency Fees Order 1986, SI 1986/2030, art 4 (amended by SI 1994/2541). As to the deposit payable on presentation of a bankruptcy petition see para 164 ante.

## UPDATE

### 725-816 Practice and procedure in insolvency proceedings

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 816 Fees orders

NOTES 1, 2--SI 1999/687, SI 1999/689 replaced: Civil Proceedings Fees Order 2008, SI 2008/1053 (see CIVIL PROCEDURE vol 11 (2009) PARA 87).

NOTES 3, 9, 10--SI 1986/2030 replaced: Insolvency Proceedings (Fees) Order 2004, SI 2004/593 (amended by SI 2005/544, SI 2006/561, SI 2007/521, SI 2008/714, SI 2009/645).

TEXT AND NOTE 5--1986 Act s 415 amended: Tribunals, Courts and Enforcement Act 2007 Sch 20 para 9.

TEXT AND NOTES 5-8--The Lord Chancellor's functions under the 1986 Act s 415 are protected functions for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS.



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## **(18) INSOLVENT PARTNERSHIPS**

### **(i) In general**

#### **817. Insolvency procedures; application of statutory provisions.**

The Lord Chancellor may, by order made with the concurrence of the Secretary of State, provide that such provisions of the Insolvency Act 1986 as may be specified in the order are to apply in relation to insolvent partnerships with such modifications as may be so specified<sup>1</sup>. Such an order may make different provisions for different cases and may contain such incidental, supplemental and transitional provisions as may appear to the Lord Chancellor necessary or expedient<sup>2</sup>.

The current order is the Insolvent Partnerships Order 1994<sup>3</sup>, which came into force on 1 December 1994<sup>4</sup>, by virtue of which insolvency proceedings may be taken against an insolvent partnership as follows.

Insolvent partnerships may be wound up as unregistered companies under Part V of the Insolvency Act 1986 as modified and they may be so wound up:

- 1030 (1) on a creditor's petition where no concurrent petition is presented against a member<sup>5</sup> or where concurrent petitions are presented against one or more members<sup>6</sup>; or
- 1031 (2) on a member's petition where no concurrent petition is presented against a member<sup>7</sup> or where concurrent petitions are presented against all members<sup>8</sup>.

Where the individual members of an insolvent partnership present a joint petition for the bankruptcy of each of them in his capacity as a member of the partnership; certain provisions of the Insolvency Act 1986 relating to bankruptcy apply as modified in relation to such bankruptcies and the winding up of the partnership business and the administration of its property without the partnership being wound up as an unregistered company under the Insolvency Act 1986<sup>9</sup>.

Insolvent partnerships may be the subject of voluntary arrangements under Part I of the Insolvency Act 1986 as modified<sup>10</sup>. Where insolvency orders are made against an insolvent partnership and an insolvent member of that partnership in his capacity as such, a corporate member of that partnership may be the subject of a voluntary arrangement under Part I of the Insolvency Act 1986 and an individual member of that partnership may be the subject of a voluntary arrangement under Part VIII of the Insolvency Act 1986<sup>11</sup>.

Insolvent partnerships may be the subject of an administration order under Part II of the Insolvency Act 1986 as modified<sup>12</sup>.

Where an insolvent partnership is being wound up as an unregistered company under Part V of the Insolvency Act 1986 as modified, certain provisions of the Company Directors Disqualification Act 1986 as modified apply<sup>13</sup>.

The Insolvent Partnerships Order 1994, in the case of insolvency proceedings in relation to companies and partnerships, relates to companies and partnerships which the courts in England and Wales have jurisdiction to wind up and, in the case of insolvency proceedings in relation to individuals, extends to England and Wales only<sup>14</sup>.

Nothing in the Insolvent Partnerships Order 1986 is to be taken as preventing:

- 1032 (a) a petition being presented against an insolvent partnership under the Financial Services and Markets Act 2000<sup>15</sup> or any other enactment<sup>16</sup>;
- 1033 (b) any creditor or creditors owed one or more debts by an insolvent partnership from presenting a petition under the Insolvency Act 1986 against one or more members of the partnership liable for that debt or those debts, as the case may be, without including the others and without presenting a petition for the winding up of the partnership as an unregistered company<sup>17</sup>.

1 Insolvent Act 1986 s 420(1). Any such order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 420(3).

In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 420 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq post.

2 Insolvent Act 1986 s 420(2).

3 See the Insolvent Partnerships Order 1994, SI 1994/2421 (amended by SI 1996/1308; SI 2001/767; SI 2001/3649).

4 Insolvent Partnerships Order 1994, SI 1994/2421, art 1(1). The Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) does not apply in relation to any case in which a winding-up order or a bankruptcy order was made under the Insolvent Partnerships Order 1986, SI 1986/2124 (revoked) in relation to a partnership or an insolvent member of a partnership; and, where the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) does not apply, the law in force immediately before the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) came into force continues to have effect: art 19(1).

5 See *ibid* art 7 (as amended), Sch 3 Pts I, II (paras 1-10); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1204 et seq.

6 See *ibid* art 8, Sch 4 Pts I, II (paras 1-30); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1218 et seq. In such a case, where an insolvent partnership is being wound up, certain provisions of the Insolvency Act 1986 as modified apply to the winding up of a corporate member of or former corporate member (see the Insolvent Partnerships Order 1994, SI 1994/2421, art 8(4), (5), (8), (9)) and to the bankruptcy of an individual member or former individual member (see art 8(6)-(9)): see para 820 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1218 et seq.

7 See *ibid* art 9, Sch 3 Pt I (paras 1-5), Sch 5; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1254 et seq.

8 See *ibid* art 10, Sch 6; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1260 et seq. In such a case, where an insolvent partnership is being wound up, certain provisions of the Insolvency Act 1986 as modified apply to the winding up of a corporate member or former corporate member (see the Insolvent Partnerships Order 1994, SI 1994/2421, art 10(2), (3), (6)) and to the bankruptcy of an individual member or former individual member (see art 10(4)-(6)): see para 821 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1260 et seq.

9 See *ibid* art 11, Sch 7 (amended by SI 2001/3649); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1266 et seq.

10 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 4, Sch 1; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1170 et seq.

11 See *ibid* art 5; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1191.

12 See *ibid* art 6, Sch 2 (amended by SI 2001/3649); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1192 et seq.

13 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 16, Sch 8 (amended by SI 2001/767; SI 2001/3649); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1297 et seq.

14 Insolvent Partnerships Order 1994, SI 1994/2421, art 1(2). For these purposes 'insolvency proceedings' means any proceedings under the Insolvency Act 1986, the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended) or the Insolvency Rules 1986, SI 1986/1925 (as amended): Insolvent Partnerships Order 1994, SI 1994/2421, arts 1(3), 2(1).

15 le under the Financial Services and Markets Act 2000 s 367.

16 Insolvent Partnerships Order 1994, SI 1994/2421, art 19(4) (substituted by SI 2001/3649).

17 Insolvent Partnerships Order 1994, SI 1994/2421, art 19(5). See further para 819 post.

## **UPDATE**

### **817-822 Insolvent partnerships**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **817 Insolvency procedures; application of statutory provisions**

TEXT AND NOTES 1, 2--Insolvency Act 1986 s 420 further amended: Constitutional Reform Act 2005 Sch 4 para 191. See further s 19, Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

NOTE 1--An order under the 1986 Act s 420 may make provision in relation to EC Council Regulation 1346/2000 but any such provision may not create an offence of a kind referred to in the European Communities Act 1972 Sch 2 para 1(1)(d): 1986 Act s 420(1A), (1B) (both added by SI 2002/1037).

NOTE 3--SI 1994/2421 further amended: SI 2002/1308, SI 2005/2114.

TEXT AND NOTE 5--In head (1) the reference to a creditor's petition is now to the petition of a creditor, of a liquidator (within the meaning of EC Regulation 1346/2000 art 2(b)), or of a temporary administrator (within the meaning of art 38): SI 1994/2421 art 8(1) (amended by SI 2002/1308).

NOTE 6--SI 1994/2421 Sch 4 amended: SI 2002/1308, SI 2005/2114.

NOTE 7--SI 1994/2421 Schs 3, 5 amended: SI 2002/1308.

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### **818. Application of subordinate legislation to insolvent partnerships.**

Specified subordinate legislation<sup>1</sup> applies as from time to time in force and with such modifications as the context requires for the purpose of giving effect to the provisions of the Insolvency Act 1986 and of the Companies Directors Disqualification Act 1986 which are applied by the Insolvent Partnerships Order 1994<sup>2</sup>.

In the case of any conflict between any provision of the subordinate legislation so applied and any provision of the Insolvent Partnerships Order 1994, the latter provision prevails<sup>3</sup>.

1 The subordinate legislation so specified is: the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952; the Insolvency Practitioners (Recognised Professional Bodies) Order 1986, SI 1986/1764; the Insolvency Rules 1986, SI 1986/1925 (amended by SI 1987/1919; SI 1989/397; SI 1991/495; SI 1993/602; SI 1995/586; SI 1998/1129; SI 1999/359; SI 1999/1022; SI 2001/763; SI 2001/1149); the Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996; the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999; the Insolvency (Amendment of Subordinate Legislation) Order 1986, SI 1986/2001 (amended by SI 1986/2245; SI 1987/1398); the Insolvency Fees Order 1986, SI 1986/2030 (amended by SI 1988/95; SI 1991/496; SI 1992/34; SI 1994/2541; SI 2001/761); the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, SI 1986/2123; the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023 (amended by SI 1999/1023; SI 2001/765); the Insolvency Practitioners Regulations 1990, SI 1990/439 (amended by SI 1993/221); the Insolvency Regulations 1994, SI 1994/2507 (amended by SI 2000/485; SI 2001/762; SI 2001/3649); the Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996, SI 1996/253; the Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909 (amended by SI 2001/764); the Co-operation of Insolvency Courts (Designation of Relevant Country) Order 1998, SI 1998/2766; the Companies (Disqualification Orders) Regulations 2001, SI 2001/967; Insolvent Partnerships Order 1994, SI 1994/2421, art 18(1), Sch 10; Interpretation Act 1978 s 17(2)(a).

2 Insolvent Partnerships Order 1994, SI 1994/2421, arts 2(1), 18(1).

3 Ibid art 18(2).

## UPDATE

### 817-822 Insolvent partnerships

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 818 Application of subordinate legislation to insolvent partnerships

NOTE 1--SI 1986/1996 amended: SI 2004/547, SI 2009/465. SI 1986/2030 replaced: Insolvency Proceedings (Fees) Order 2004, SI 2004/593 (amended by SI 2005/544, SI 2006/561, SI 2007/521, SI 2008/714, SI 2009/645). SI 1987/2023 further amended: SI 2003/1367, SI 2007/1906. SI 1990/439 replaced: Insolvency Practitioner Regulations 2005, SI 2005/524 (amended by SI 2007/3224, SI 2009/2748, SI 2009/3081). SI 1994/2507 further amended: SI 2004/472, SI 2007/3224, SI 2009/482.

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### 819. Insolvency proceedings against persons found to be members of an insolvent partnership.

Where at any time after a winding-up or, as the case may be, bankruptcy petition has been presented to the court against any person, whether by virtue of or, as the case may be, under the provisions of the Insolvent Partnerships Order 1994<sup>1</sup> or not, the attention of the court is drawn to the fact that the person in question is a member of an insolvent partnership, the court may make an order as to the future conduct of the insolvency proceedings; and any such order may apply any provisions of the Insolvent Partnerships Order 1994 with any necessary modifications<sup>2</sup>. Where a bankruptcy petition has been so presented against more than one

individual, the court may give such directions for consolidating the proceedings, or any of them, as it thinks just<sup>3</sup>.

Any order or directions under the above provisions may be made or given on the application of the official receiver, any responsible insolvency practitioner<sup>4</sup> or the trustee of the partnership or any other interested person and may include provisions as to the administration of the estate of the partnership, and, in particular, how it and the separate estate of any member are to be administered<sup>5</sup>.

1 le the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended).

2 Insolvency Act 1986 ss 168(5A), 303(2A) (added by the Insolvent Partnerships Order 1994, SI 1994/2421, art 14 (1), (2)).

3 Insolvency Act 1986 s 303(2B) (added by the Insolvent Partnerships Order 1994, SI 1994/2421, art 14(2)).

4 For these purposes, 'responsible insolvency practitioner' means: (1) in a winding up, the liquidator of an insolvent partnership or corporate member; and (2) in bankruptcy, the trustee of the estate of an individual member, and in either case includes the official receiver when so acting: Insolvent Partnerships Order 1994, SI 1994/2421, art 2(1). 'Corporate member' means an insolvent member which is a company; and 'individual member' means an insolvent member who is an individual: art 2(1).

5 Insolvency Act 1986 ss 168(5B), 303(2C) (added by the Insolvent Partnerships Order 1994, SI 1994/2421, art 14(1), (2)).

## UPDATE

### 817-822 Insolvent partnerships

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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## **(ii) Winding up of Insolvent Partnership as Unregistered Company on Creditor's Petition where Concurrent Petitions presented against one or more Members**

### **820. Application of the statutory provisions.**

Certain provisions of the Insolvency Act 1986 relating to the winding up of unregistered companies<sup>1</sup> apply in relation to the winding up of an insolvent partnership as an unregistered company on a creditor's petition where insolvency petitions<sup>2</sup> are presented by the petitioner against the partnership and against one or more members or former members of the partnership in their capacity as such<sup>3</sup>.

Certain of the provisions of the Insolvency Act 1986 are modified in their application in relation to insolvent partnerships<sup>4</sup> which are being so wound up by virtue of the above provisions<sup>5</sup>.

The provisions of the Insolvency Act 1986 relating to the winding up of companies registered under the Companies Act 1985<sup>6</sup>, in so far as they relate to winding up of companies by the court in England and Wales on a creditor's petition, apply in relation to the winding up of a corporate member or former corporate member (in its capacity as such) of an insolvent partnership which is being wound up by virtue of the above provisions<sup>7</sup>.

Certain provisions of the Insolvency Act 1986 relating to bankruptcy<sup>8</sup>, in so far as they relate to the bankruptcy of individuals in England and Wales on a petition presented by a creditor, apply in relation to the bankruptcy of an individual member or former individual member, in his capacity as such, of an insolvent partnership which is being wound up by virtue of the above provisions<sup>9</sup>.

The provisions of the Insolvency Act 1986 applied by the above provisions are further modified so that references to a corporate or individual member include any former such member against whom an insolvency petition is being or has been presented by virtue of the above provisions<sup>10</sup>.

1    Ie the Insolvency Act 1986 ss 220-222 (as amended), 225-229: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1147 et seq.

2    For these purposes, 'insolvency petition' means, in the case of a petition presented to the court: (1) against a corporate member, a petition for its winding up by the court; (2) against an individual member, a petition for a bankruptcy order to be made against that individual, where, in either case, the petition is presented in conjunction with a petition for the winding up of the partnership by the court as an unregistered company under the Insolvency Act 1986: Insolvent Partnerships Order 1994, SI 1994/2421, art 2(1).

3    Ibid art 8(1). As to the application of the statutory provisions to the winding up of an insolvent partnership as an unregistered company on the petition of a creditor where no concurrent petition is presented against a member see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1204 et seq.

4    The provisions which are modified are the Insolvency Act 1986 ss 117, 122-125 (as amended), 131, 133, 136, 137, 139-141, 143, 146, 147, 168 (as amended), 172, 174, 175, 189, 211, 220-222 (as amended), 230, 231, 234, 264, 265, 267, 268, 271, 283 (as amended), 284, 288, 292-296, 298-303 (as amended), 305, 314, 328, 331, 356, Sch 4: Insolvent Partnerships Order 1994, SI 1994/2421, art 8(2), (3), Sch 4 para 1(1), (2). See further notes 6, 8 infra.

5    Ibid art 8(2).

6    Ie the Insolvency Act 1986 Pt IV (ss 73-219) (as amended), Pt VI (ss 230-246) (as amended), Pt VII (ss 247-251) and Pts XII-XIX (ss 386-444) (as amended). Certain of those provisions are modified in their application in relation to the corporate or former corporate members of insolvent partnerships in such manner that, after modification, they are as set out in the Insolvent Partnerships Order 1994, SI 1994/2421, Sch 4 Pt II (paras 5-30): see art 8(8); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1221 et seq.

7    Ibid art 8(4), (5).

8    Ie the Insolvency Act 1986 Pt IX (ss 264-371) (as amended), other than ss 269, 270, 287, 297 and Pts X-XIX (ss 372-444) (as amended). Certain of those provisions are modified in their application in relation to the individual members or former individual members of insolvent partnerships in such manner that, after modification, they are as set out in the Insolvent Partnerships Order 1994, SI 1994/2421, Sch 4 Pt II (paras 5-30): art 8(8).

The modifications specified in art 8(8), Sch 4 Pt II (paras 5-30) are to the Insolvency Act 1986 s 264 (see para 124 note 11 ante), s 265 (see para 125 note 6 ante), s 267 (see para 126 notes 4, 11 ante), s 268 (see para 127 note 5 ante), s 271 (see para 195 note 2 ante), s 283 (as amended) (see para 216 note 5 ante), s 284 (see para 217 note 2 ante), s 288 (see paras 244 note 2, 245 note 1 ante), s 292 (see para 317 note 4 ante), s 293 (see paras 265 note 3, 318 note 3 ante), s 294 (see paras 267 note 3, 319 note 3 ante), s 295 (see paras 269 note 2, 321 note 2 ante), s 296 (see para 321 note 8 ante), s 298 (see paras 356 note 1, 361 note 1 ante), s 299 (see para 376 note 1 ante), s 300 (see para 368 note 2 ante), s 301 (see para 328 note 3 ante), s 302 (see para 343 note 3 ante), s 303 (see para 344 note 1 ante), s 305 (see paras 326 note 1, 456 note 4 ante), s 314(7) (see para 463 note 3 ante), s 328 (see para 577 note 3 ante), s 331 (see para 606 note 4 ante) and s 356(2) (see para 716 note 4 ante).

For the text of the modified provisions see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1219 et seq.

9 Ibid art 8(6), (7).

10 Ibid art 8(9).

## **UPDATE**

### **817-822 Insolvent partnerships**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **820 Application of the statutory provisions**

TEXT AND NOTE 2--Reference to a creditor's petition is now to the petition of a creditor, of a liquidator (within the meaning of EC Regulation 1346/2000 art 2(b)) appointed in proceedings by virtue of art 3(1), or of a temporary administrator (within the meaning of art 38): SI 1994/2421 art 8(1) (amended by SI 2002/1308).

NOTE 4--1986 Act ss 117, 124, 221, 264, 265 (as modified) amended: SI 2002/1308.

NOTE 7--SI 1994/2421 reg 8(5) amended: SI 2006/622.

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### **(iii) Winding up of Insolvent Partnership as Unregistered Company on Member's Petition where Concurrent Petitions presented against all the Members**

#### **821. Application of the statutory provisions.**

Certain provisions of the Insolvency Act 1986 relating to the winding up of unregistered companies<sup>1</sup> apply in relation to the winding up of an insolvent partnership as an unregistered company on a member's petition where insolvency petitions<sup>2</sup> are presented by the petitioner against the partnership and against all its members in their capacity as such<sup>3</sup>.

The provisions of the Insolvency Act 1986 relating to the winding up of companies registered under the Companies Act 1985<sup>4</sup>, in so far as they relate to winding up of companies by the court in England and Wales on a member's petition, apply in relation to the winding up of a corporate member, in its capacity as such, of an insolvent partnership which is being wound up by virtue of the above provisions<sup>5</sup>.

Certain provisions of the Insolvency Act 1986 relating to bankruptcy<sup>6</sup>, in so far as they relate to the bankruptcy of individuals in England and Wales where a bankruptcy petition is presented by a debtor, apply in relation to the bankruptcy of an individual member, in his capacity as such, of an insolvent partnership which is being wound up by virtue of the above provisions<sup>7</sup>.

1 le: (1) the Insolvency Act 1986 ss 117, 124 (as amended), 125, 221 (as amended), 264, 265, 271 and 272, modified in such manner that, after modification, they are as set out in the Insolvent Partnerships Order 1994, SI 1994/2421, art 10(1)(a), Sch 6 (see note 6 infra; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1260 et seq); and (2) the Insolvency Act 1986 ss 220 (as amended), 225, 227-229, s 220 being modified in such manner that, after modification, it is as set out in the Insolvent Partnerships Order 1994, SI 1994/2421, art 10(1)(b), Sch 4 Pt I para 2 (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1219).

2 For the meaning of 'insolvency petition' see para 820 note 2 ante.

3 Insolvent Partnerships Order 1994, SI 1994/2421, art 10(1). As to the application of statutory provisions to the winding up of an insolvent partnership on the petition of a member where no concurrent petition is presented against a member see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1254 et seq.

4 le the Insolvency Act 1986 Pt IV (ss 73-219) (as amended), Pt VI (ss 230-246) (as amended), Pt VII (ss 247-251) and Pts XII-XIX (ss 386-444) (as amended). Certain of those provisions are modified in their application in relation to the corporate members of insolvent partnerships in such manner that, after modification, they are as set out in the Insolvent Partnerships Order 1994, SI 1994/2421, Sch 4 Pt II (paras 5-30) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 1221, 1225 et seq): art 10(6).

5 Ibid art 10(2), (3).

6 le the Insolvency Act 1986 Pt IX (ss 264-371) (as amended), other than ss 273, 274, 287 and 297, and Pts X-XIX (ss 372-444) (as amended). Certain of those provisions are modified in their application in relation to the individual members of insolvent partnerships in such manner that, after modification, they are as set out in the Insolvent Partnerships Order 1994, SI 1994/2421, Sch 4 Pt II (paras 5-30) (see para 820 note 8 ante). save that the provisions on summary administration of a debtor's estate apply in relation to the individual members of insolvent partnerships in such manner that, after modification, those provisions are as set out in art 10(6), Sch 7 (amended by SI 2001/3649) (see para 822 note 4 post): Insolvent Partnerships Order 1994, SI 1994/2421, art 10(6).

The modifications specified in art 10(1)(a), Sch 6 (see note 1 supra) are to the Insolvency Act 1986 s 264 (see para 124 note 11 ante), s 265 (see para 125 note 6 ante), s 271 (see para 195 note 2 ante) and s 272 (see para 159 note 2 ante).

For the text of the modified provisions see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1261 et seq.

7 Insolvent Partnerships Order 1994, SI 1994/2421, art 10(4), (5).

## UPDATE

### 817-822 Insolvent partnerships

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 821 Application of the statutory provisions

NOTES 1, 4, 6--SI 1994/2421 Schs 4, 6 amended: SI 2002/1308, SI 2005/2114, SI 2006/622.

NOTE 5--SI 1994/2421 art 10(3) amended: SI 2006/622.

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#### **(iv) Insolvency Proceedings not involving Winding Up of Insolvent Partnership as Unregistered Company where Individual Members present Joint Bankruptcy Petition**

##### **822. Application of the statutory provisions.**

In general, the statutory provisions of the Insolvency Act 1986 relating to bankruptcy<sup>1</sup>, in so far as they relate to the insolvency of individuals in England and Wales where a bankruptcy petition is presented by a debtor, apply in relation to the bankruptcy of the individual members<sup>2</sup> of an insolvent partnership where those members jointly present a petition to the court for orders to be made for the bankruptcy of each of them in his capacity as a member of the partnership, and the winding up of the partnership business and administration of its property, without the partnership being wound up as an unregistered company<sup>3</sup>. Certain of those provisions are modified in their application in relation to the individual members of insolvent partnerships<sup>4</sup>.

<sup>1</sup> The Insolvency Act 1986 Pt IX (ss 264-371) (as amended), other than ss 273, 274, 287, and Pts X-XIX (ss 372-444) (as amended).

<sup>2</sup> For the meaning of 'individual member' see para 819 note 4 ante.

<sup>3</sup> Insolvent Partnerships Order 1994, SI 1994/2421, art 11(1), (2).

<sup>4</sup> Ibid art 11(3), Sch 7 (amended by SI 2001/3649). The modifications there specified are to the Insolvency Act 1986 s 264 (see para 124 note 11 ante), s 265 (see para 125 note 6 ante), s 266 (see para 124 note 11 ante), s 272 (see para 159 note 2 ante), s 275 (see para 206 note 1 ante), s 283 (as amended) (see para 216 note 5 ante), s 284 (see para 217 note 2 ante), s 290 (see paras 293 note 3, 295 note 6, 296 note 2 ante), s 292 (see para 317 note 4 ante), s 293 (see paras 265 note 3, 318 note 3 ante), s 294 (see paras 267 note 3, 319 note 3 ante), s 295 (see paras 269 note 2, 321 note 2 ante), s 296 (see para 321 note 8 ante), s 297 (see paras 322 note 2, 323 note 8 ante), s 298 (see paras 356 note 1, 361 note 1 ante), s 299 (see para 376 note 1 ante), s 300 (see para 368 note 2 ante), s 301 (see para 328 note 3 ante), s 305 (see paras 326 note 1, 456 note 3 ante), s 312 (see para 457 note 7 ante), s 328 (see para 577 note 3 ante), s 331 (see para 606 note 4 ante) and s 387 (see para 577 note 7 ante).

For the text of the modified provisions see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1267 et seq.

#### **UPDATE**

##### **817-822 Insolvent partnerships**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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#### **(19) INSOLVENT ESTATES OF DECEASED PERSONS**

##### **(i) In general**

##### **823. Power to apply statutory provisions.**

The Lord Chancellor may, by order made with the concurrence of the Secretary of State, provide that such provisions of the Insolvency Act 1986 as may be specified in the order are to apply in relation to the administration of the insolvent estates of deceased persons<sup>1</sup> with such modifications as may be so specified<sup>2</sup>. Such an order may make different provision for different cases and may contain such incidental, supplemental and transitional provisions as may appear to the Lord Chancellor necessary or expedient<sup>3</sup>.

1 As to when the estate of a deceased person is insolvent see para 824 post.

2 Insolvency Act 1986 s 421(1) (amended by the Insolvency Act 2000 s 12(2)). An order under the Insolvency Act 1986 s 421 (as amended) must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 421(3). In exercise of the powers conferred on him by s 421 (as amended) and of all other powers enabling him in that behalf, with the concurrence of the Secretary of State, the Lord Chancellor made the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, which came into force on 29 December 1986: art 1. See further para 824 et seq post.

3 Insolvency Act 1986 s 421(2). The modifications of the Insolvency Act 1986 which may be made by an order under s 421 (as amended) include any modifications which are necessary or expedient in consequence of s 421A (as added) (see para 833 post): s 421A(6) (added by the Insolvency Act 2000 s 12(1)).

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 823 Power to apply statutory provisions

TEXT AND NOTES--An order under the 1986 Act s 421 may make provision in relation to EC Council Regulation 1346/2000 but any such provision may not create an offence of a kind referred to in the European Communities Act 1972 Sch 2 para 1(1)(d): 1986 Act s 421(1A), (1B) (both added by the Insolvency Act 1986 (Amendment) Regulations 2002, SI 2002/1037).

1986 Act s 421 further amended: Constitutional Reform Act 2005 Sch 4 para 192. See further 2005 Act s 19, Sch 7 para 4.

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### 824. Persons dying before presentation of bankruptcy petition.

The estate of a deceased person is insolvent<sup>1</sup> if, when realised, it will be insufficient to meet in full all the debts and other liabilities to which it is subject<sup>2</sup>. Certain provisions of the Insolvency Act 1986<sup>3</sup> apply in relation to the administration in bankruptcy of the insolvent estates of deceased persons dying before the presentation of a bankruptcy petition with any prescribed modifications<sup>4</sup> and with any further such modifications as may be necessary to render them applicable to the estate of a deceased person<sup>5</sup>; and the provisions of the Insolvency Rules

1986<sup>6</sup>, the Insolvency Regulations 1994<sup>7</sup> and any other order made with regard to fees and deposits<sup>8</sup> apply accordingly<sup>9</sup>.

1 le for the purposes of the Insolvency Act 1986 s 421 (as amended): see para 823 ante.

2 Ibid s 421(4).

3 le the provisions of the Insolvency Act 1986 specified in the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pts II, III: see para 825 et seq post.

4 le the modifications specified in ibid Sch 1 Pts II, III: see note 3 supra.

5 le, in particular, the modifications specified in ibid Sch 1 Pt I, Table. Except in so far as the context otherwise requires: (1) for any reference to the bankrupt or, as the case may be, the debtor, there is to be substituted a reference to the deceased debtor or his personal representative (or, if there is no personal representative, such person as the court may order), as the case may require; (2) for any reference to the bankrupt's estate there is to be substituted a reference to the deceased debtor's estate; (3) for any reference to the commencement of the bankruptcy there is to be substituted a reference to the date of the insolvency administration order; (4) for any reference to an individual being adjudged bankrupt there is to be substituted a reference to an insolvency administration order being made; and (5) for any reference to a debtor's petition there is to be substituted a reference to a petition by the personal representative of a deceased debtor for an insolvency administration order: Sch 1 Pt I, Table cols 1, 2. For the meaning of 'insolvency administration order' see para 826 note 1 post.

6 le the Insolvency Rules 1986, SI 1986/1925 (amended by SI 1987/1919; SI 1989/397; SI 1991/495; SI 1993/602; SI 1995/586; SI 1998/1129; SI 1999/359; SI 1999/1022; SI 2001/763; SI 2001/1149).

7 le the Insolvency Regulations 1994, SI 1994/2507 (amended by SI 2000/485; SI 2001/762).

8 le under the Insolvency Act 1986 s 415: see para 816 ante. See further the Insolvency Fees Order 1986, SI 1986/2030 (amended by SI 1988/95, SI 1991/496; SI 1992/34; SI 1994/2451; SI 2001/761); and the Department of Trade and Industry (Fees) Order 1988, SI 1988/93 (amended by SI 1990/1473; SI 1995/1294).

9 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1). In the case of any conflict between any provision of the Insolvency Rules 1986 (as amended) and any provision of the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, the latter provision prevails: art 3(2).

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 824 Persons dying before presentation of bankruptcy petition

NOTE 7--SI 1994/2507 further amended: SI 2004/472, SI 2007/3224, SI 2009/482.

NOTE 8--SI 1986/2030 replaced: Insolvency Proceedings (Fees) Order 2004, SI 2004/593 (amended by SI 2005/544, SI 2006/561, SI 2007/521, SI 2008/714, SI 2009/645).

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## (ii) Individual Voluntary Arrangements

### 825. Individual voluntary arrangements.

Where the court has made an interim order<sup>1</sup> in respect of an individual who subsequently dies, the following statutory provisions apply<sup>2</sup>:

- 1034 (1) the provisions relating to the nominee's report on the debtor's proposal<sup>3</sup>, with the modification that, where the individual dies before he has submitted to the nominee a document setting out the terms of the voluntary arrangement which he is proposing and a statement of his affairs, the nominee must, after the death of the individual comes to his knowledge, give notice to the court that the individual has died<sup>4</sup>; and, after receiving such a notice, the court must discharge the interim order<sup>5</sup>;
  - 1035 (2) the provisions relating to the summoning of a creditors' meeting<sup>6</sup>, with the modification that, where the individual dies before a creditors' meeting has been held, no such meeting must be held and, if the individual was at the date of his death an undischarged bankrupt, the personal representative must give notice of the death to the trustee of his estate and the official receiver<sup>7</sup>;
  - 1036 (3) the provisions relating to decisions of the creditors' meeting<sup>8</sup>;
  - 1037 (4) the provisions relating to the report by the chairman of decisions to the court<sup>9</sup>;
  - 1038 (5) the provisions relating to:
- .12**
- 13. (a) the effect of the approval of a voluntary arrangement<sup>10</sup>;
  - 14. (b) the effect of approval where the debtor was an undischarged bankrupt<sup>11</sup>;
  - 15. (c) challenging the meeting's decision<sup>12</sup>,
- .13**
- 1039 with the modification that they cease to apply on or after the death of the individual<sup>13</sup>;
  - 1040 (6) the provisions relating to the implementation and supervision of an approved voluntary arrangement<sup>14</sup>, with the modification that, where the individual dies after a voluntary arrangement has been approved, the personal representative of the deceased debtor and any of the deceased debtor's creditors are among the persons who may apply to the court if dissatisfied by any act, omission or decision of the supervisor and the supervisor must give notice to the court that the individual has died<sup>15</sup>.

1 le under the Insolvency Act 1986 s 252: see paras 83 et seq ante.

2 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt III.

3 le the Insolvency Act 1986 s 256: see para 90 et seq ante.

4 Ibid s 256(1A) (added by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt III para 1).

5 Insolvency Act 1986 s 256(1B) (added by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt III para 1).

6 le the Insolvency Act 1986 s 257: see para 97 ante.

7 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt III para 2.

8 le the Insolvency Act 1986 s 258: see para 100 et seq ante.

9 le ibid s 259: see para 105 ante.

- 10    le *ibid* s 260: see para 107 ante.
- 11    le *ibid* s 261: see para 107 ante.
- 12    le *ibid* s 262: see para 118 et seq ante.
- 13    Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt III para 4.
- 14    le the Insolvency Act 1986 s 263: see para 108 et seq ante.
- 15    Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt III para 5.

## **UPDATE**

### **823-843 Insolvent estates of deceased persons**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### **(iii) Petitions for Insolvency Administration Order**

#### **826. Who may present petition for insolvency administration order.**

A petition for an insolvency administration order<sup>1</sup> to be made may be presented to the court<sup>2</sup>:

- 1041 (1)    by one of the individual's creditors or jointly by one or more of them<sup>3</sup>;
- 1042 (2)    by the supervisor of, or any person (other than the individual) who is for the time being bound by, a voluntary arrangement proposed by the deceased debtor and approved under Part VIII of the Insolvency Act 1986<sup>4</sup>;
- 1043 (3)    where a criminal bankruptcy order has been made against the individual, by the Official Petitioner or by any person specified in the order in pursuance of the Powers of Criminal Courts Act 1973<sup>5</sup>.

Subject to the above provisions, the court may make an insolvency administration order on any such petition<sup>6</sup>.

1    For these purposes, 'insolvency administration order' means an order for the administration in bankruptcy of the insolvent estate of a deceased debtor, being an individual at the date of his death: Insolvency Act 1986 s 385(1) (amended by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, arts 2, 6); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 2. As to when the estate of a deceased person is insolvent see para 824 ante.

2    le pursuant to the Insolvency Act 1986 s 264 (see para 124 ante) (applied with modifications by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 1).

3    Insolvency Act 1986 s 264(1)(a) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 1(a), (b)). For the prescribed form of petition see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 1. The Insolvency Act 1986 s

264(1)(b) (see para 124 head (2) ante) is to be omitted: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 1(c).

4 Insolvency Act 1986 s 264(1)(c) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 1(d)). For the prescribed form of petition see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 2.

5 Insolvency Act 1986 s 264(1)(d) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 1(e)). For the prescribed form of petition, in any case where a creditor could present such a petition under the Insolvency Act 1986 s 264(1)(a) (as modified: see note 3 supra), see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 3. See also the Insolvency Act 1986 s 277 (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 9); and para 215 ante. As to the prospective repeal of the Insolvency Act 1986 s 264(1)(d) (as so modified) and s 277 (as so applied) see para 844 note 2 post; and as to the repeal of the Powers of Criminal Courts Act 1973 s 39 see para 844 note 1 post.

6 Insolvency Act 1986 s 264(2) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 1(f)). For the prescribed form of insolvency administration order see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 4.

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 826 Who may present petition for insolvency administration order

TEXT AND NOTES 1-5--Also heads (4) by a temporary administrator; (5) by a liquidator: 1986 Act s 264(1) (amended by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240). For the meanings of 'temporary administrator' and 'liquidator' see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 450.

The prescribed form of the petition under heads (4) and (5) is SI 1986/1999 Sch 3 Form 1: Sch 1 Pt II para 1(ca), (cb) (added by SI 2002/1309).

SI 1986/1999 Sch 3 substituted: SI 2002/1309.

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### 827. Preliminary conditions to be satisfied.

An insolvency administration petition<sup>1</sup> must, unless the court otherwise directs, be served on the personal representative and must be served on such other persons as the court may direct<sup>2</sup>. An insolvency administration petition may not be withdrawn without the permission of the court<sup>3</sup>. If it appears to the court appropriate to do so on the grounds that there has been a contravention of the Insolvency Rules 1986<sup>4</sup> or for any other reason, the court has a general power to dismiss a petition to the court for an insolvency administration order with or without costs or to stay proceedings on such a petition; and, where it stays proceedings on a petition, it may do so on such terms and conditions as it thinks fit<sup>5</sup>. Where a petition for an insolvency administration order is pending at a time when a criminal bankruptcy order is made against an

individual, or is presented after such an order has been made, the court may<sup>6</sup>, on the application of the Official Petitioner, dismiss the petition if it appears appropriate to do so<sup>7</sup>.

1 For these purposes, 'insolvency administration petition' means a petition for an insolvency administration order: Insolvency Act 1986 s 385(1) (amended by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, arts 2, 6); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 2. For the meaning of 'insolvency administration order' see para 826 note 1 ante.

2 Insolvency Act 1986 s 266(1) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999 art 3(1), Sch 1 Pt II para 2(a)). See also para 124 ante. As to the procedure for the presentation and filing of petitions generally see para 163 et seq ante.

3 Insolvency Act 1986 s 266(2) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 2); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

4 Ie the Insolvency Rules 1986, SI 1986/1925 (as amended).

5 Insolvency Act 1986 s 266(3) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 2(b)); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

6 Ie without prejudice to the Insolvency Act 1986 s 266(3) (as modified): see supra.

7 Ibid s 266(4) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 2); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to the prospective repeal of the Insolvency Act 1986 s 266(4) (as so applied) see para 844 note 2 post.

## **UPDATE**

### **823-843 Insolvent estates of deceased persons**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **827 Preliminary conditions to be satisfied**

TEXT AND NOTE 2--Now an insolvency administration petition must, if a liquidator has been appointed in proceedings by virtue of EC Council Regulation 1346/2000 on insolvency proceedings art 3(1) in relation to the deceased debtor, be served on him and, unless the court directs otherwise, be served on the personal representative, and be served on such other persons as the court may direct: 1986 Act s 266(1) (substituted by the Administration of Insolvent Estates of Deceased Persons (Amendment) Order 2002, SI 2002/1309).

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### **828. Petition for insolvency administration order.**

A creditor's petition must be in respect of one or more debts owed by the deceased debtor; and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or, as the case may be, at least one of the debts, is owed<sup>1</sup>. A creditor's petition may be presented to the court in respect of a debt or debts only if, had the debtor been alive at the time the petition was presented:

- 1044 (1) the amount of the debt, or the aggregate amount of the debts, owed by the debtor would have been equal to or exceeded the bankruptcy level<sup>2</sup>; or
- 1045 (2) the debt, or each of the debts, owed by the debtor would have been for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain future time, and would have been unsecured<sup>3</sup>.

A debt which is the debt, or one of the debts, in respect of which a creditor's petition is presented need not be unsecured if either:

- 1046 (a) the petition contains a statement by the person having the right to enforce the security that he is willing, in the event of an insolvency administration order<sup>4</sup> being made, to give up his security for the benefit of all the deceased debtor's creditors; or
- 1047 (b) the petition is not expressed to be made in respect of the secured part of the debt and contains a statement by that person of the estimated value at the date of the petition of the security for the secured part of the debt<sup>5</sup>.

In a case falling within head (b) above the secured and unsecured parts of the debt are to be treated<sup>6</sup> as separate debts<sup>7</sup>.

A petition by the personal representative of a deceased debtor for an insolvency administration order may be presented to the court only on the grounds that the estate of the deceased debtor is insolvent<sup>8</sup>.

1 Insolvency Act 1986 s 267(1) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999 art 3(1), Sch 1 Pt II para 3); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to the procedure on a petition for an insolvency administration order see para 829 post; as to creditors' petitions generally see para 126 et seq ante; and as to the procedure for the presentation and filing of petitions generally see para 163 et seq ante.

2 For the meaning of 'the bankruptcy level' see para 126 note 5 ante.

3 Insolvency Act 1986 s 267(2)(a), (b) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 3(b)). The Insolvency Act 1986 s 267(2)(c), (d) (see para 126 heads (3), (4) ante) does not apply: Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 3(b).

4 For the meaning of 'insolvency administration order' see para 826 note 1 ante.

5 Insolvency Act 1986 s 269(1) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 4); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

6 See for the purposes of the Insolvency Act 1986 s 267 (as applied and modified: see notes 1, 3 supra) and s 269 (as modified: see note 5 supra and note 7 infra).

7 Ibid s 269(2) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 4).

8 Insolvency Act 1986 s 272(1) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 6(a), (b)); Administration of Insolvent Estates of Deceased Persons



Order 1986, SI 1986/1999, Sch 1 Pt I. For the prescribed form of petition see Sch 3, Form 6. As to when the estate of a deceased person is insolvent see para 824 ante.

## **UPDATE**

### **823-843 Insolvent estates of deceased persons**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **828 Petition for insolvency administration order**

NOTE 8--SI 1986/1999 Sch 3 Form 6 substituted: SI 2002/1309.

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## **(iv) Procedure on Petitions for Insolvency Administration Order**

### **829. Procedure on a petition for an insolvency administration order.**

The court may make an insolvency administration order<sup>1</sup> on a petition for an order presented by a person other than a personal representative of the deceased debtor<sup>2</sup> if it is satisfied:

- 1048 (1) that the debt, or one of the debts, in respect of which the petition was presented is a debt which, having been payable at the date of the petition or having since become payable, has neither been paid nor secured or compounded for or has no reasonable prospect of being paid when it falls due<sup>3</sup>; and
- 1049 (2) that there is a reasonable probability that the estate will be insolvent<sup>4</sup>.

Where an insolvency administration order is made on a petition presented by the supervisor of, or any person who is for the time being bound by, a voluntary arrangement proposed and approved under Part VIII of the Insolvency Act 1986<sup>5</sup>, any expenses properly incurred as expenses of the administration of the voluntary arrangement in question are a first charge on the deceased debtor's estate<sup>6</sup>.

The statutory provisions<sup>7</sup> relating to a petition based on a criminal bankruptcy order<sup>8</sup> apply in cases where a petition has been presented by the Official Petitioner or by any person specified in the criminal bankruptcy order<sup>9</sup>.

On the hearing of a petition presented by a personal representative of a deceased debtor<sup>10</sup>, the court must make an insolvency administration order if it is satisfied that the deceased debtor's estate is insolvent<sup>11</sup>.

A petition for an insolvency administration order may not be presented to the court after proceedings have been commenced in any court of justice for the administration of the deceased debtor's estate<sup>12</sup>. Where proceedings have been commenced in any such court for the administration of the deceased debtor's estate, that court may, if satisfied that the estate is insolvent, transfer the proceedings to the court exercising jurisdiction in bankruptcy<sup>13</sup>. Where

proceedings have been transferred to the court exercising jurisdiction in bankruptcy, that court may make an insolvency administration order as if a petition for such an order had<sup>14</sup> been presented<sup>15</sup>.

Nothing in the statutory provisions relating to:

- 1050 (a) who may present a petition<sup>16</sup>;
- 1051 (b) other preliminary conditions<sup>17</sup>;
- 1052 (c) the grounds of a creditor's petition<sup>18</sup>;
- 1053 (d) creditors with security<sup>19</sup>;
- 1054 (e) proceedings on a creditor's petition<sup>20</sup>;
- 1055 (f) the appointment of an insolvency practitioner by the court<sup>21</sup>,

invalidates any payment made or any act or thing done in good faith by the personal representative before the date of the insolvency administration order<sup>22</sup>.

1 For the meaning of 'insolvency administration order' see para 826 note 1 ante.

2 Ie a petition under the Insolvency Act 1986 s 264(1) (as modified): see para 826 ante.

3 Ibid s 271(1)(a) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 5). As to the procedure on creditors' petitions generally see para 195 et seq ante.

4 Insolvency Act 1986 s 271(1)(b) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 5). As to when the estate of a deceased person is insolvent see para 824 ante.

5 Ie a petition under the Insolvency Act 1986 s 264(1)(c) (as modified): see para 826 head (2) ante.

6 Ibid s 276(2) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 8); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

7 Ie the Insolvency Act 1986 s 277 (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 9): see para 215 ante. As to the prospective repeal of the Insolvency Act 1986 s 277 (as so applied) see para 844 note 2 post.

8 Ie pursuant to ibid s 264(1)(d) (as modified): see para 826 head (3) ante. As to the prospective repeal of s 264(1)(d) (as so modified) see para 844 note 2 post.

9 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I, Pt II para 9.

10 Ie under the Insolvency Act 1986 s 272 (as modified): see para 828 ante.

11 Ibid 273 (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 7). For the prescribed form of insolvency administration order see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 4.

12 Insolvency Act 1986 s 271(2) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 5).

13 Insolvency Act 1986 s 271(3) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 5).

14 Ie as if a petition for such an order had been presented under the Insolvency Act 1986 s 264 (as modified): see para 826 ante.

15 Ibid s 271(4) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 5). For the prescribed form of insolvency administration order see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 5.

16 Ie the Insolvency Act 1986 s 264 (as modified): see para 826 ante.

- 17    le ibid s 266 (as modified): see para 827 ante.
- 18    le ibid s 267 (as modified): see para 828 ante.
- 19    le ibid s 269 (as modified): see para 828 ante.
- 20    le ibid s 271 (as substituted): see supra.
- 21    le ibid s 273 (as substituted): see supra.
- 22    Ibid s 271(5) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 5).

## **UPDATE**

### **823-843 Insolvent estates of deceased persons**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### **829 Procedure on a petition for an insolvency administration order**

NOTE 11--SI 1986/1999 Sch 3 Form 4 substituted: SI 2002/1309.

NOTE 15--SI 1986/1999 Sch 3 Form 5 substituted: SI 2002/1309.

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## **(v) Insolvency Administration Orders; Administration otherwise than in Bankruptcy**

### **830. Commencement and duration of insolvency administration order.**

The administration in bankruptcy of the insolvent estate of a deceased debtor commences with the day on which the insolvency administration order<sup>1</sup> is made<sup>2</sup>.

The court may annul an insolvency administration order if it at any time appears to the court:

- 1056 (1) that, on the grounds existing at the time the order was made, the order ought not to have been made; or
- 1057 (2) that, to the extent required by the Insolvency Rules 1986<sup>3</sup>, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured to the satisfaction of the court<sup>4</sup>.

Where the court annuls an insolvency administration order:

- 1058 (a) any sale or other disposition of property, payment made or other thing duly done, under any provision of the Insolvency Act 1986, by or under the authority of

- the official receiver or a trustee of the deceased debtor's estate or by the court is valid; but
- 1059 (b) if any of the deceased debtor's estate is then vested in such a trustee, it vests in such person as the court may appoint or, in default of any such appointment, it reverts to the personal representative of the deceased debtor or, if there is no personal representative, to such person as the court may order, as the case may require, on such terms, if any, as the court may direct<sup>5</sup>.

1 For the meaning of 'insolvency administration order' see para 826 note 1 ante.

2 Insolvency Act 1986 s 278(a) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 10). The Insolvency Act 1986 s 278(b) (see para 213 head (2) ante) does not apply: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 10. As to the commencement and duration of bankruptcy orders generally see para 213 ante.

3 See the Insolvency Rules 1986, SI 1986/1925 (as amended).

4 Insolvency Act 1986 s 282(1) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 11); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to the annulment of bankruptcy orders generally see para 610 et seq ante.

5 Insolvency Act 1986 s 282(4) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 11); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. The court may include in its order such supplemental provisions as may be authorised by the Insolvency Rules 1986, SI 1986/1999 (as amended): Insolvency Act 1986 s 282(4) (as so applied). As to the effect of the annulment of bankruptcy orders generally see para 623 et seq ante.

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(19) INSOLVENT ESTATES OF DECEASED PERSONS/ (v) Insolvency Administration Orders; Administration otherwise than in Bankruptcy/831. Deceased person's estate administered otherwise than in bankruptcy.

### 831. Deceased person's estate administered otherwise than in bankruptcy.

Where the estate of a deceased person is insolvent<sup>1</sup> and is being administered otherwise than in bankruptcy, the same provisions as may be in force for the time being under the law of bankruptcy with respect to the assets of individuals adjudged bankrupt apply to the administration of the estate with respect to the respective rights of secured and unsecured creditors<sup>2</sup>, to debts and liabilities provable<sup>3</sup>, to the valuation of future and contingent liabilities<sup>4</sup> and to the priorities<sup>5</sup> of debts and other payments<sup>6</sup>. However, the reasonable funeral, testamentary and administration expenses have priority over preferential debts<sup>7</sup>; and the statutory prohibition on a person's being appointed as trustee of a bankrupt's estate unless he is, at the time of the appointment, qualified to act as an insolvency practitioner in relation to the bankrupt<sup>8</sup> does not apply<sup>9</sup>.

- 1 As to when the estate of a deceased person is insolvent see para 824 ante.
- 2 As to the effect of bankruptcy on creditors' rights generally see para 490 ante.
- 3 As to provable debts generally see para 491 ante.
- 4 As to contingent debts generally see para 493 ante.
- 5 As to the priority of debts generally see para 573 et seq ante.
- 6 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 4(1).
- 7 Ibid art 4(2). For these purposes, 'preferential debts' means the preferential debts listed in the Insolvency Act 1986 s 386, Sch 6 (as amended) (see para 577 et seq ante): Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 4(2).
- 8 Ie the Insolvency Act 1986 s 292(2): see para 316 ante.
- 9 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 4(3).

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(19) INSOLVENT ESTATES OF DECEASED PERSONS/(vi) Protection of Deceased Debtor's Estate; Investigation of his Affairs/832. Meaning of 'deceased debtor's estate'.

## **(vi) Protection of Deceased Debtor's Estate; Investigation of his Affairs**

### **832. Meaning of 'deceased debtor's estate'.**

The deceased debtor's estate comprises:

- 1060 (1) all property belonging to or vested in the deceased debtor at the commencement of the administration in bankruptcy of the insolvent estate<sup>1</sup> of the deceased debtor<sup>2</sup>; and
- 1061 (2) any property which, by virtue of any of the statutory provisions<sup>3</sup>, is comprised in that estate or is treated as falling within head (1) above<sup>4</sup>.

For these purposes<sup>5</sup>, the petition is to be treated as having been presented, and the insolvency administration order<sup>6</sup> is to be treated as having been made, on the date of death of the deceased debtor<sup>7</sup>.

The above provisions do not, however, apply to (inter alia) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the family of the deceased debtor<sup>8</sup>.

References<sup>9</sup> to property, in relation to a deceased debtor, include:

1062 (a) the capacity to exercise and take proceedings for exercising all such powers over or in respect of property as might have been exercised by his personal representative for the benefit of the estate on the date of the insolvency administration order and as are specified<sup>10</sup> in the Insolvency Act 1986<sup>11</sup>;

1063 (b) any power exercisable by him over or in respect of property, except in so far as the power is exercisable over or in respect of property not for the time being comprised in the deceased debtor's estate and is so exercisable at a time after either the official receiver has had his release in respect of that estate<sup>12</sup> or a meeting summoned by the trustee of that estate has been held<sup>13</sup> or cannot be so exercised for the benefit of the deceased debtor's estate; and a power exercisable over or in respect of property is deemed<sup>14</sup> to vest in the person entitled to exercise it at the time of the transaction or event by virtue of which it is exercisable by that person, whether or not it becomes so exercisable at that time<sup>15</sup>.

For these purposes<sup>16</sup>, property comprised in a deceased debtor's estate is so comprised subject to the rights of any person other than the deceased debtor, whether as a secured creditor<sup>17</sup> of the deceased debtor or otherwise in relation thereto, but disregarding any rights in relation to which a statement<sup>18</sup> by a secured creditor was made in the petition on which an insolvency administration order was made, and any rights which have been otherwise given up in accordance with the Insolvency Rules 1986<sup>19</sup>.

The above provisions have effect subject to the provisions of any enactment not contained in the Insolvency Act 1986 under which any property is to be excluded from a bankrupt's estate<sup>20</sup>.

1 As to when the estate of a deceased person is insolvent see para 824 ante.

2 Insolvency Act 1986 s 283(1)(a) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 12); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

3 Ie any of the provisions contained in Insolvency Act 1986 Pt IX (ss 283-371) (as amended, applied and modified).

4 Ibid s 283(1)(b) (applied by Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12).

5 Ie for the purposes of the Insolvency Act 1986 s 283 (as amended and modified).

6 For the meaning of 'insolvency administration order' see para 826 note 1 ante.

7 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12.

8 Insolvency Act 1986 s 283(2)(b) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12(b)). As to the property excluded from a bankrupt's, or, as the case may be, a deceased debtor's, estate generally see para 216 heads (a)-(h) ante.

9 Ie references in the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II).

10 Ie in the Insolvency Act 1986 s 283(4) (as applied: see note 15 infra).

11 Ibid s 283(4A) (added by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12(b)).

12 Ie under the Insolvency Act 1986 s 299(2) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 18). As to the release of the trustee generally see para 377 ante.

13 Ie under the Insolvency Act 1986 s 331 (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 26). As to the final meeting of creditors generally see para 606 ante.

14 le for the purposes of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II).

15 Insolvency Act 1986 s 283(4) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

16 le for the purposes of any provision in the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II).

17 For the meaning of 'secured creditor' see para 560 ante.

18 le a statement such as is required by the Insolvency Act 1986 s 269(1)(a) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 4). See also para 126 note 7 ante.

19 Insolvency Act 1986 s 285(5) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

20 Insolvency Act 1986 s 283(6) (applied the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(19) INSOLVENT ESTATES OF DECEASED PERSONS/(vi) Protection of Deceased Debtor's Estate; Investigation of his Affairs/833. Joint tenancies.

### 833. Joint tenancies.

Where:

1064 (1) an insolvency administration order<sup>1</sup> has been made in respect of the insolvent estate of a deceased person<sup>2</sup>;

1065 (2) the petition for the order was presented on or after 2 April 2001<sup>3</sup> and within the period of five years beginning with the day on which he died; and

1066 (3) immediately before his death he was beneficially entitled to an interest in any property as joint tenant,

then, for the purpose of securing that debts and other liabilities to which the estate is subject are met, the court may, on an application by the trustee appointed pursuant to the insolvency administration order, make an order requiring the survivor<sup>4</sup> to pay to the trustee an amount not exceeding the value lost to the estate<sup>5</sup>.

The order may be made on such terms and conditions as the court thinks fit<sup>6</sup>; and, in determining whether to make such an order, and the terms of such an order, the court must

have regard to all the circumstances of the case, including the interests of the deceased's creditors and of the survivor; but, unless the circumstances are exceptional, the court must assume that the interests of the deceased's creditors outweigh all other considerations<sup>7</sup>. Any sums required to be paid to the trustee in accordance with such an order are comprised in the estate<sup>8</sup>.

1 For these purposes, 'insolvency administration order' has the same meaning as in any order under the Insolvency Act 1986 s 421 (as amended) (see para 826 note 1 ante): s 421A(9) (added by the Insolvency Act 2000 s 12(1)).

2 As to when the estate of a deceased person is insolvent see para 824 ante.

3 The date on which the Insolvency Act 2000 s 12 came into force: see the Insolvency Act 2000 (Commencement No 1 and Transitional Provisions) Order 2001, SI 2001/766, art 2(1)(b). As to the position where the petition for an insolvency administration order was presented before that date see *Re Palmer (a debtor)* [1994] Ch 316, [1993] 4 All ER 812, CA.

4 For these purposes, 'survivor' means the person who, immediately before the death, was beneficially entitled as joint tenant with the deceased or, if the person who was so entitled dies after the making of the insolvency administration order, his personal representatives: Insolvency Act 1986 s 421A(7) (added by the Insolvency Act 2000 s 12(1)). If there is more than one survivor, an order may be made against all or any of them, but no survivor may be required to pay more than so much of the value lost to the estate as is properly attributable to him: Insolvency Act 1986 s 421A(8) (added by the Insolvency Act 2000 s 12(1)). For the meaning of 'value lost to the estate' see note 5 infra.

5 Insolvency Act 1986 s 421A(1), (2) (added by the Insolvency Act 2000 s 12(1)). For these purposes, 'value lost to the estate' means the amount which, if paid to the trustee, would, in the court's opinion, restore the position to what it would have been if the deceased had been adjudged bankrupt immediately before his death: Insolvency Act 1986 s 421A(9) (as added: see note 1 supra).

6 Ibid s 421A(4) (added by the Insolvency Act 2000 s 12(1)).

7 Insolvency Act 1986 s 421A(3) (added by the Insolvency Act 2000 s 12(1)).

8 Insolvency Act 1986 s 421A(5) (added by the Insolvency Act 2000 s 12(1)).

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

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### 834. Restrictions on dispositions of property, proceedings and remedies.

The statutory provisions relating to:

- 1067 (1) the restrictions on dispositions of property<sup>1</sup>; and
- 1068 (2) the restrictions on proceedings and remedies<sup>2</sup>,



apply to the administration in bankruptcy of the insolvent estate of a deceased debtor<sup>3</sup> dying before the presentation of a bankruptcy petition; but those provisions have effect as if the petition for the insolvency administration order<sup>4</sup> had been presented, and the insolvency administration order had been made, on the date of death of the deceased debtor<sup>5</sup>.

1    Ie the Insolvency Act 1986 s 284: see para 217 ante.

2    Ie ibid s 285: see para 218 ante.

3    As to when the estate of a deceased person is insolvent see para 824 ante.

4    For the meaning of 'insolvency administration order' see para 826 note 1 ante.

5    Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12.

## **UPDATE**

### **823-843 Insolvent estates of deceased persons**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(19) INSOLVENT ESTATES OF DECEASED PERSONS/(vi) Protection of Deceased Debtor's Estate; Investigation of his Affairs/835. Power to appoint interim receiver.

### **835. Power to appoint interim receiver.**

If it is shown to be necessary for the protection of the property<sup>1</sup> of the deceased debtor, the court may at any time after the presentation of a petition for an insolvency administration order and before making an insolvency administration order, appoint the official receiver to be interim receiver of the property of the deceased debtor<sup>2</sup>. The court may by an order appointing any person to be an interim receiver direct that his powers are to be limited or restricted in any respect; but, save as so directed, an interim receiver has, in relation to the property of the deceased debtor, all the rights, powers, duties and immunities of a receiver and manager<sup>3</sup> pending the appointment of a trustee<sup>4</sup>. An order of the court appointing any person to be an interim receiver must require that person to take immediate possession of the property of the deceased debtor or, as the case may be, the part of it to which his powers as interim receiver are limited<sup>5</sup>. Where an interim receiver has been appointed, the personal representative of the deceased debtor, or, if there is no personal representative, such person as the court may order, must give to the interim receiver such inventory of the property of the deceased debtor and such other information, and must attend on the interim receiver at such times, as the latter may reasonably require for the purpose of carrying out his functions<sup>6</sup>.

Where an interim receiver is appointed, the statutory restriction on proceedings and remedies<sup>7</sup> applies for the period between the appointment and the making of an insolvency administration order on the petition or the dismissal of the petition, as if the appointment were the making of such an order<sup>8</sup>.

A person ceases to be interim receiver of the property of the deceased debtor if the petition for an insolvency administration order relating to the deceased debtor is dismissed, if an

insolvency administration order is made on the petition or if the court by order or otherwise terminates the appointment<sup>9</sup>.

1 For these purposes, references to the deceased debtor's property are to all his property, whether or not it would be comprised in his estate if an insolvency administration order were made: Insolvency Act 1986 s 286(8) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 13); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. For the meaning of 'insolvency administration order' see para 826 note 1 ante.

2 Insolvency Act 1986 s 286(1) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 13); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to the appointment of an interim receiver generally see paras 222-224 ante. The Insolvency Act 1986 s 286(2) (see para 223 ante) does not apply: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 13.

3 le under the Insolvency Act 1986 s 285(3) (as applied): see para 834 ante.

4 Ibid s 286(3) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 13); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to the order of appointment of an interim receiver generally see para 225 ante.

5 Insolvency Act 1986 s 286(4) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 13); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

6 Insolvency Act 1986 s 286(5) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 13); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to the inquiry into a debtor's dealings and property generally see para 228 ante.

7 See note 3 supra.

8 Insolvency Act 1986 s 286(6) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 13); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to the restriction on proceedings and remedies generally see para 229 ante.

9 Insolvency Act 1986 s 286(7) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 13); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to the termination of the appointment of an interim receiver generally see para 232 ante.

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(19) INSOLVENT ESTATES OF DECEASED PERSONS/(vi) Protection of Deceased Debtor's Estate; Investigation of his Affairs/836. Receivership pending appointment of trustee.

### 836. Receivership pending appointment of trustee.

Between the making of an insolvency administration order<sup>1</sup> and the time at which the deceased debtor's estate vests in the trustee<sup>2</sup> the official receiver is the receiver and manager of the

deceased debtor's estate and is under a duty to act as such<sup>3</sup>. The statutory provisions relating to the functions of the official receiver and his duties, powers and liabilities<sup>4</sup> apply to the administration in bankruptcy of the insolvent estate of a deceased debtor<sup>5</sup>.

1 For the meaning of 'insolvency administration order' see para 826 note 1 ante.

2 As to the vesting of the estate in the trustee see para 390 et seq ante.

3 Insolvency Act 1986 s 287(1) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 14); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

4 In the Insolvency Act 1986 s 287(2)-(5): see paras 234, 235 ante.

5 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I, Pt II para 14.

## UPDATE

### 823-843 Insolvent estates of deceased persons

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Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(19) INSOLVENT ESTATES OF DECEASED PERSONS/(vi) Protection of Deceased Debtor's Estate; Investigation of his Affairs/837. Statement of affairs.

### 837. Statement of affairs.

Where an insolvency administration order<sup>1</sup> has been made, the personal representative, or, if there is no personal representative, such person as the court may, on the application of the official receiver, direct, must submit to the official receiver a statement of the deceased debtor's affairs containing particulars of the assets and liabilities of the estate as at the date of the insolvency administration order together with other particulars of the affairs of the deceased debtor in the prescribed form or as the official receiver may require<sup>2</sup>. The statement must be submitted before the end of the period of 56 days beginning with the date of a request by the official receiver for the statement or such longer period as he or the court may allow<sup>3</sup>.

If he thinks fit, the official receiver may release the personal representative, or any person directed by the court to submit a statement of the deceased debtor's affairs, from his duty to submit such a statement of affairs, or extend the statutory period for doing so; and, where the official receiver has refused to exercise his statutory power, the court may, if it thinks fit, exercise it<sup>4</sup>.

A personal representative, or any person directed by the court, who without reasonable excuse fails to comply with the above obligation or without reasonable excuse submits a statement of affairs that does not comply with the prescribed requirements, is guilty of contempt of court and liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>5</sup>.

1 For the meaning of 'insolvency administration order' see para 826 note 1 ante.

2 Insolvency Act 1986 s 288(1) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 15). For the prescribed form of statement of affairs see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 3, Form 7. As to the bankrupt's statement of affairs generally see para 244 et seq ante.

3 Insolvency Act 1986 s 288(2) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 15).

4 Insolvency Act 1986 s 288(3) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 15); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to the bankrupt's release from his duty to submit a statement of affairs and extension of time generally see para 248 ante.

5 Insolvency Act 1986 s 288(4) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 15); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq.

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(19) INSOLVENT ESTATES OF DECEASED PERSONS/(vi) Protection of Deceased Debtor's Estate; Investigation of his Affairs/838. Duties in relation to the official receiver.

#### 838. Duties in relation to the official receiver.

The official receiver is not under any duty to investigate the conduct and affairs of the deceased debtor unless he thinks fit but may make such report, if any, to the court as he thinks fit<sup>1</sup>.

Where an insolvency administration order<sup>2</sup> has been made, the personal representative of the deceased debtor, or, if there is no personal representative, such person as the court may order, is under a duty:

1069 (1) to deliver possession of the deceased debtor's estate to the official receiver; and

1070 (2) to deliver up to the official receiver all books, papers and other records of which he has possession or control and which relate to the deceased debtor's estate and its affairs including any which would be privileged from disclosure in any proceedings<sup>3</sup>.

In the case of any part of the deceased debtor's estate which consists of things possession of which cannot be delivered to the official receiver, and in the case of any property that may be claimed for the deceased debtor's estate by the trustee, it is the duty of the personal representative, or, if there is no personal representative, such person as the court may order, to do all such things as may reasonably be required by the official receiver for the protection of those things or that property<sup>4</sup>.

The personal representative of the deceased debtor, or, if there is no personal representative, such person as the court may order, must give the official receiver such inventory of the deceased debtor's estate and such other information, and must attend on the official receiver at such times, as the official receiver may reasonable require<sup>5</sup>.

If the personal representative, or, if there is no personal representative, such person as the court may order, fails without reasonable excuse to comply with any of the above obligations, he is guilty of contempt of court and is liable to be punished accordingly, in addition to any other punishment to which he may be subject<sup>6</sup>.

1 Insolvency Act 1986 s 289 (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 16). As to the official receiver's duty to investigate generally see para 256 ante.

2 For the meaning of 'insolvency administration order' see para 826 note 1 ante.

3 Insolvency Act 1986 s 291(1) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 17); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. The Insolvency Act 1986 s 291(1) (as so applied) and s 291(2) (as applied) (see *infra*) do not apply where, by virtue of s 297 (as applied and modified) (see para 839 post), the deceased debtor's estate vests in a trustee immediately on the making of the insolvency administration order: s 291(3) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 17); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to the bankrupt's duties in relation to the official receiver generally see para 243 ante.

4 Insolvency Act 1986 s 291(2) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 17); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. See also note 3 *supra*.

5 Insolvency Act 1986 s 291(4) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 17); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

6 Insolvency Act 1986 s 291(6) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 17); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq.

## UPDATE

### 823-843 Insolvent estates of deceased persons

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### 838 Duties in relation to the official receiver

TEXT AND NOTE 1--Insolvency Act 1986 s 289 substituted by Enterprise Act 2002 s 258: see PARA 256.

TEXT AND NOTE 5--The information which the official receiver may reasonably require must be for a purpose of the 1986 Act Pt IX Ch II (ss 283-291), or in connection with the making of a bankruptcy restrictions order (see PARA 646A.1): s 291(4) (substituted by the 2002 Act Sch 23 para 5).

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## **(vii) Trustee in Bankruptcy**

### **839. Trustee in bankruptcy.**

The statutory provisions relating to trustees in bankruptcy<sup>1</sup> apply, with the relevant modifications<sup>2</sup>, to the administration in bankruptcy of the insolvent estate of a deceased debtor where an insolvency administration order<sup>3</sup> has been made<sup>4</sup>; and, where a meeting of creditors is summoned for the purposes of any provision relating to trustees in bankruptcy, the provisions of the Insolvency Rules 1986<sup>5</sup> relating to the trustee in bankruptcy and the creditors' committee apply accordingly<sup>6</sup>.

The statutory provisions relating to the general functions of the trustee<sup>7</sup> apply to the administration in bankruptcy of the insolvent estate of a deceased debtor where an insolvency administration order has been made<sup>8</sup>. In the exercise of those functions, the trustee must have regard to any claim by the personal representative to payment of reasonable funeral, testamentary and administration expenses incurred by him in respect of the deceased debtor's estate, or, if there is no such personal representative, to any claim by any other person to payment of any such expenses incurred by him in respect of the estate, provided that the trustee has sufficient funds in hand for the purpose; and such claims to payment have priority over preferential debts<sup>9</sup>.

1    Ie the Insolvency Act 1986 ss 292-304 (as amended): see para 316 et seq ante.

2    Ie with the general modifications contained in the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt I: see para 824 note 5 ante. In addition, the Insolvency Act 1986 s 297 is modified so as to exclude s 297(4) (see para 322 ante): Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 18.

3    For the meaning of 'insolvency administration order' see para 826 note 1 ante.

4    Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch I Pt II paras 18, 19.

5    Ie the Insolvency Rules 1986, SI 1986/1925, rr 6.120-6.166 (as amended): see para 320 et seq ante.

6    Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 18.

7    Ie the Insolvency Act 1986 s 305(1)-(3) (see para 456 ante) and s 305(4) (see para 326 ante).

8    Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I, Sch 1 Pt II para 20.

9    Insolvency Act 1986 s 305(5) (added by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch I Pt II para 20). Preferential debts are those listed in the Insolvency Act 1986 s 386, Sch 6 (as amended) (see para 577 et seq ante): s 305(5) (as so added).

## **UPDATE**

### **823-843 Insolvent estates of deceased persons**

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Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(19) INSOLVENT ESTATES OF DECEASED PERSONS/(viii) Administration of Deceased Debtor's Estate/840. Vesting, acquisition, control, realisation and distribution of deceased debtor's estate.

### **(viii) Administration of Deceased Debtor's Estate**

#### **840. Vesting, acquisition, control, realisation and distribution of deceased debtor's estate.**

The statutory provisions relating to the vesting, acquisition, control, realisation and distribution of a bankrupt's estate<sup>1</sup> apply, with the relevant modifications<sup>2</sup>, to the administration in bankruptcy of the insolvent estate of a deceased debtor<sup>3</sup> where an insolvency administration order<sup>4</sup> has been made<sup>5</sup>.

The modifications to those statutory provisions which effect a significant change to them in their application to the estate of a deceased debtor are:

- 1071 (1) in relation to after-acquired property, the trustee may by notice in writing claim for the deceased debtor's estate any property which has been acquired by, or has devolved on, the deceased debtor or his personal representative since the date of death of the deceased debtor<sup>6</sup>;
- 1072 (2) in relation to the priority of debts, any surplus remaining after the payment of the debts that are preferential or rank equally must be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the date of death of the deceased debtor<sup>7</sup>;
- 1073 (3) in relation to debts to spouses, such debts are payable at the specified rate in respect of the period during which they have been outstanding since the date of death of the deceased debtor<sup>8</sup>;
- 1074 (4) in relation to the final distribution, where a surplus remains after payment in full and with interest of all the deceased debtor's creditors and the payment of the expenses of the bankruptcy, the surplus must be paid to the personal representative unless the court orders otherwise<sup>9</sup>;
- 1075 (5) in the case of a transaction at an undervalue, the time at which an individual enters into a transaction at an undervalue is a relevant time if the transaction is entered into at a time in the period of five years ending with the date of death of the deceased debtor<sup>10</sup>.

1    Ie the Insolvency Act 1986 ss 306-349 (as amended): see paras 391 et seq, 401, 418, 443 et seq, 480 et seq, 547, 577, 589, 593 et seq, 603, 647 et seq, 676 et seq, 686 et seq, 695 ante.

2    Ie with the general modifications in the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch I Pt I: see para 824 note 5 ante. For the other modifications see text heads (1)-(4) infra.

3    As to when the estate of a deceased person is insolvent see para 824 ante.

4    For the meaning of 'insolvency administration order' see para 826 note 1 ante.

5    Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Pt II paras 21-28.

6    Insolvency Act 1986 s 307(1) (applied and modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 22). As to after-acquired property generally see para 445 et seq ante.

7 Insolvency Act 1986 s 328(4) (applied and modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 24). As to priority of debts generally see para 577 et seq ante.

8 Insolvency Act 1986 s 329(2)(b) (applied and modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 24). As to debts to spouses generally see para 586 ante.

9 Insolvency Act 1986 s 330(5) (applied and modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 25).

10 Insolvency Act 1986 s 341(1)(a) (applied and modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch I Pt II para 27). For the meaning of 'relevant time' generally see para 660 ante.

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 840 Vesting, acquisition, control, realisation and distribution of deceased debtor's estate

NOTE 9--1986 Act s 330(5) (as modified) is subject to EC Council Regulation 1346/2000 on insolvency proceedings art 35: 1986 Act s 330(6) (added by the Administration of Insolvent Estates of Deceased Persons (Amendment) Order 2002, SI 2002/1309).

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### 841. Application of statutory provisions.

The following provisions of the Insolvency Act 1986 apply, with relevant modifications<sup>1</sup>, to the administration in bankruptcy of the insolvent estate of a deceased debtor<sup>2</sup> where an insolvency administration order<sup>3</sup> has been made:

- 1076 (1) the provisions<sup>4</sup> relating to the powers of the court in bankruptcy<sup>5</sup>;
- 1077 (2) the general provisions<sup>6</sup> relating to individual insolvency<sup>7</sup>;
- 1078 (3) the interpretation provisions<sup>8</sup> relating to the insolvency of individuals and bankruptcy<sup>9</sup>;
- 1079 (4) the provisions<sup>10</sup> relating to preferential debts<sup>11</sup>;
- 1080 (5) the provisions<sup>12</sup> relating to insolvency practitioners and their qualification<sup>13</sup>;
- 1081 (6) the provisions<sup>14</sup> relating to public administration (England and Wales)<sup>15</sup>;
- 1082 (7) the provisions<sup>16</sup> relating to subordinate legislation<sup>17</sup>;
- 1083 (8) the provisions<sup>18</sup> against debt avoidance<sup>19</sup>;
- 1084 (9) the miscellaneous and general<sup>20</sup> provisions<sup>21</sup>;
- 1085 (10) the provisions<sup>22</sup> relating to interpretation<sup>23</sup>; and
- 1086 (11) the transitional provisions<sup>24</sup> and savings<sup>25</sup>.



- 1    le with the general modifications in the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt I: see para 824 note 5 ante.
- 2    As to when the estate of a deceased person is insolvent see para 824 ante.
- 3    For the meaning of 'insolvency administration order' see para 826 note 1 ante.
- 4    le the Insolvency Act 1986 ss 363-371 (as amended) (see paras 219, 220, 228, 236 et seq, 264, 301 et seq ante), other than s 364 (see para 221 ante).
- 5    Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 30.
- 6    le the Insolvency Act 1986 ss 372-379 (as amended): see paras 6, 7, 25, 113, 157, 239, 739 et seq, 760, 763 ante.
- 7    Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 30.
- 8    le the Insolvency Act 1986 ss 380-385 (as amended). However, in the definition of 'bankruptcy debt' in s 382 (see para 491 ante), for the words 'commencement of the bankruptcy', wherever they occur, there are to be substituted the words 'date of death of the deceased debtor' (Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 31); and at the end of the definition of 'the court' in the Insolvency Act 1986 s 385 (as amended) (see para 764 ante) there are to be added the words 'and subject thereto "the court" means the court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his death' (Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 33).
- 9    Ibid Sch 1 Pt II paras 30-33.
- 10   le the Insolvency Act 1986 s 386 (as amended) and s 387, other than s 387(2)-(4): see para 577 ante. However, s 387(6)(a), (b) is modified so that for the reference therein to the making of the bankruptcy order there is to be substituted a reference to the date of death of the deceased debtor: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 35.
- 11   Ibid Sch 1 Pt II paras 34, 35.
- 12   le the Insolvency Act 1986 ss 388-398 (as amended): see paras 43 et seq, 74, 75 ante.
- 13   Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 36.
- 14   le the Insolvency Act 1986 ss 399-410: see paras 26 et seq ante and para 845 post. As to the prospective repeal of s 402 see para 844 note 2 post.
- 15   Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 36.
- 16   le the Insolvency Act 1986 ss 412, 413 (as amended), 415, 418-420: see paras 22, 758, 816, 817 ante.
- 17   Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 36.
- 18   le the Insolvency Act 1986 ss 423-425: see para 664 et seq ante.
- 19   Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 36.
- 20   le the Insolvency Act 1986 s 426 (as amended), s 428(3) (as amended), s 430, s 431 (summary proceedings), s 432 (offences by bodies corporate), s 433 (as amended) and s 434: see paras 3, 4, 21, 38, 46, 728, 785, 786 ante.
- 21   Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 36.
- 22   le the Insolvency Act 1986 s 435 (meaning of 'associate': see para 5 ante) and s 436 (expressions used generally).
- 23   Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 36.
- 24   le the Insolvency Act 1986 s 437. However, the Insolvency Act 1986 s 437 only applies so far as it relates to Sch 11 Pt II, except para 13 (discharge from old bankruptcy: see para 629 ante), Sch 11 Pt IV (insolvency practitioners), and Sch 11 Pt V (general transitional provisions and savings): Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 36.

25 Ibid Sch 1 Pt II para 36.

## **UPDATE**

### **823-843 Insolvent estates of deceased persons**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(19) INSOLVENT ESTATES OF DECEASED PERSONS/(ix) Bankruptcy Offences/842. Bankruptcy offences.

## **(ix) Bankruptcy Offences**

### **842. Bankruptcy offences.**

The following provisions apply where the court has made an insolvency administration order<sup>1</sup>; and they apply whether or not the insolvency administration order is annulled, but proceedings for an offence may not be instituted after the annulment<sup>2</sup>.

A person is guilty of an offence if, in the 12 months before the date of death of the deceased debtor<sup>3</sup>, he acquired or received property from the deceased debtor knowing or believing that the deceased debtor owed money in respect of the property, and that the deceased debtor did not intend, or was unlikely to be able, to pay the money he so owed<sup>4</sup>.

A person who commits such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>5</sup>.

It is not, however, a defence in proceedings for such an offence that anything relied on, in whole or in part, as constituting that offence was done outside England and Wales<sup>6</sup>; but a person is not guilty of such an offence if the disposal, acquisition or receipt of the property was in the ordinary course of a business carried on by the deceased debtor at the time of the disposal, acquisition or receipt<sup>7</sup>.

Proceedings for such an offence may not be instituted except by the Secretary of State or by or with the consent of the Director of Public Prosecutions<sup>8</sup>.

1 Insolvency Act 1986 s 350(1) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. For the meaning of 'insolvency administration order' see para 826 note 1 ante. As to the general provisions relating to bankruptcy offences see para 707 ante.

2 Insolvency Act 1986 s 350(2) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 28); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

3 For these purposes, a reference to the number of months or years before the date of death of the deceased debtor is to that period ending with the presentation of the petition for an insolvency administration order: Insolvency Act 1986 s 351(c) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 28); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

4 Insolvency Act 1986 s 359(2) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 29(b)); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to fraudulent dealing by a person with a bankrupt generally see para 720 ante.

5 Insolvency Act 1986 ss 350(6), 359(2), 430, Sch 10 (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II paras 28, 29, 36); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. For the meaning of 'the statutory maximum' see para 4 ante.

6 Insolvency Act 1986 s 350(4) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 28); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I.

7 Insolvency Act 1986 s 359(3) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 29(a)); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. In determining, for these purposes, whether any property is disposed of, acquired or received in the ordinary course of business carried on by the deceased debtor, regard may be had, in particular, to the price paid for the property: Insolvency Act 1986 s 359(4) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 29). References to the disposing of property include pawning or pledging it; and references to acquiring or receiving property are to be read accordingly: Insolvency Act 1986 s 359(5) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 29).

8 Insolvency Act 1986 s 350(5) (applied by the Administration of Insolvent Estates of Deceased Persons Order 1986 Sch 1 Pt II para 28); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt I. As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) paras 1066, 1079 et seq.

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/1. BANKRUPTCY AND INDIVIDUAL VOLUNTARY ARRANGEMENTS/(19) INSOLVENT ESTATES OF DECEASED PERSONS/(x) Procedure after Death of Debtor/843. Procedure after death of debtor.

## (x) Procedure after Death of Debtor

### 843. Procedure after death of debtor.

Unless the court otherwise orders, if a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter are to be continued as if he were alive, subject to the following modifications<sup>1</sup>:

- 1087 (1) where a bankruptcy order has been made otherwise than on a debtor's petition and the debtor has subsequently died without submitting a statement of his affairs to the official receiver, the personal representative or such other person as the court, on the application of the official receiver, may direct, must submit to the official receiver a statement of the deceased debtor's affairs containing particulars of the assets and liabilities of the estate as at the date of the order

together with other particulars of the affairs of the deceased debtor in the prescribed form<sup>2</sup> or as the official receiver may require and the Insolvency Rules 1986<sup>3</sup> apply to such a statement as they apply to an ordinary statement of affairs<sup>4</sup>; and the statement must be submitted before the end of the period of 56 days beginning with the date of a request by the official receiver for the statement or such longer period as he or the court may allow<sup>5</sup>;

1088 (2) if the trustee intends to declare a final dividend, he must declare and distribute that dividend without regard to the claim of any person in respect of a debt not proved in the bankruptcy and of the personal representative of a debtor dying after the presentation of a bankruptcy petition in respect of reasonable funeral and testamentary expenses of which notice has not already been given to the trustee<sup>6</sup>.

The reasonable funeral and testamentary expenses have priority over preferential debts<sup>7</sup>.

If a debtor dies after presentation of a bankruptcy petition but before service, the court may order service to be effected on his personal representative or such other person as it thinks fit<sup>8</sup>.

1 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 5(1).

2 For the prescribed form of statement of affairs see *ibid* art 5(1), Sch 3, Form 7.

3 *Ie* the Insolvency Rules 1986, SI 1986/1925 (as amended).

4 Insolvency Act 1986 s 288(1) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 5(1), Sch 2 para 1). As to the bankrupt's statement of affairs generally see para 244 ante.

5 Insolvency Act 1986 s 288(2) (substituted by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 2 para 1).

6 Insolvency Act 1986 s 330(4)(b) (modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 2 para 2). As to final distribution generally see para 605 ante.

7 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 5(2). The preferential debts are those specified in the Insolvency Act 1986 s 386, Sch 6 (as amended) (see para 577 et seq ante); Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 5(2).

8 *Ibid* art 5(3).

## UPDATE

### 823-843 Insolvent estates of deceased persons

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(1) IN GENERAL/844. Purpose and nature of criminal bankruptcy; abolition of power to make criminal bankruptcy orders.

## 2. CRIMINAL BANKRUPTCY

### (1) IN GENERAL

#### **844. Purpose and nature of criminal bankruptcy; abolition of power to make criminal bankruptcy orders.**

The power to make a criminal bankruptcy order formerly conferred on the Crown Court<sup>1</sup> has been abolished on and after 3 April 1989<sup>2</sup>. However, criminal bankruptcy orders made before that date are still governed by the provisions contained in the Insolvency Act 1986.

The purpose of criminal bankruptcy in relation to convicted persons was to make available to those who had suffered, at the hands of the offender, loss or damage, amounting in the aggregate to a specified minimum amount, and not attributable to personal injury, the machinery of the bankruptcy provisions of the Insolvency Act 1986 so as to facilitate the recovery of assets to make good that loss or damage.

The Crown Court had power, in appropriate circumstances, to make a criminal bankruptcy order against a convicted person<sup>3</sup>. Such an order enabled the Official Petitioner<sup>4</sup> or any person specified in the order to present a criminal bankruptcy petition against the offender, on which the court had to make a bankruptcy order<sup>5</sup>. Following the making of such a bankruptcy order, the bankruptcy proceeds in general as any other bankruptcy save that the official receiver must be the trustee<sup>6</sup> and there is no creditors' committee<sup>7</sup>. Any creditor of the bankrupt, however his debt arose and whether or not connected with the bankrupt's criminal activities, may prove his debt in the ordinary manner<sup>8</sup>. A person specified in a criminal bankruptcy order as having suffered loss or damage is to be treated as a creditor of the bankrupt; and a copy of the order is sufficient evidence of his claim, subject to its being shown by any party to the bankruptcy proceedings that the loss or damage actually suffered was more or, as the case may be, less than the amount specified in the order<sup>9</sup>. A person adjudged bankrupt on a criminal bankruptcy order may be discharged only by the court<sup>10</sup>.

The Official Petitioner has important functions to fulfil in connection with criminal bankruptcy proceedings: his role is designed to assist the victims of the offender in such proceedings<sup>11</sup>.

1 The power conferred by the Powers of Criminal Courts Act 1973 s 39 (as amended and repealed): see para 847 et seq post. Section 39 (as amended) was repealed on 1 January 2000: see the Criminal Justice Act 1988 s 170(2), Sch 16; the Criminal Justice Act 1988 (Commencement No 13) Order 1999, SI 1999/3425, art 2(a), (b).

2 Criminal Justice Act 1988 ss 101(1), 171(1); Criminal Justice Act 1988 (Commencement No 7) Order 1989, SI 1989/264, art 2, Schedule Pt II. Nothing in the Criminal Justice Act 1988 s 101(1) affects any criminal bankruptcy order made before 3 April 1989 or prevents the taking of any step following such an order: s 101(2).

As from such day as the Secretary of State may by order made by statutory instrument appoint, the following provisions of the Insolvency Act 1986 are to be repealed: s 264(1)(d) and the word 'or' immediately preceding it (see para 164 head (4) ante); s 266(4) (see para 124 note 13 ante and para 849 post); s 267(3) (see para 126 note 6 ante); s 277 (see para 215 ante and para 851 post); s 282(2) (see paras 613, 614 ante and para 852 post); in s 293(1) (see para 265 note 3 ante) the words 'does not apply where the bankruptcy order was made on a petition under s 264(1)(d) (criminal bankruptcy); and it'; s 297(1) (see para 323 ante); s 327 (see para 603 ante and para 856 post); s 341(4), (5) (see para 660 ante); s 382(1)(c) (see para 491 head (3) ante); in s 383(1) (a) (see para 560 note 2 ante) the words from '(being' to 'question'; in s 385(1) (see para 845 note 1 post) the definition of 'criminal bankruptcy order'; and s 402 (see para 845 post): Criminal Justice Act 1988 ss 171(1), 170(2), Sch 16. At the date at which this volume states the law no such day had been appointed.

3 See para 847 post.

4 As to the Official Petitioner see para 845 post.

5 See para 849 et seq post.

6 See para 853 post.

7 See para 855 post.

8 See para 856 post.

9 See para 856 post.

10 See para 857 post.

11 See para 845 post.

## UPDATE

### 844-858 Criminal bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(1) IN GENERAL/845. The Official Petitioner.

#### 845. The Official Petitioner.

There continues to be an officer known as the Official Petitioner for the purpose of discharging, in relation to cases in which a criminal bankruptcy order<sup>1</sup> has been made, the functions assigned to him by or under the Insolvency Act 1986; and the Director of Public Prosecutions continues, by virtue of his office, to be the Official Petitioner<sup>2</sup>.

The functions of the Official Petitioner include the following:

- 1089 (1) to consider whether, in a case in which a criminal bankruptcy order has been made, it is in the public interest that he should present a bankruptcy petition<sup>3</sup>;
- 1090 (2) to present such a petition in any case where he determines that it is in the public interest for him to do so;
- 1091 (3) to make payments, in such cases as he may determine, towards expenses incurred by other persons in connection with proceedings in pursuance of such a petition; and
- 1092 (4) to exercise, so far as he considers it in the public interest to do so, any of the powers conferred on him by or under the Insolvency Act 1986<sup>4</sup>.

Any functions of the Official Petitioner may be discharged on his behalf by any person acting with his authority<sup>5</sup>.

The Official Petitioner is to be regarded for all purposes<sup>6</sup> as a creditor of the bankrupt<sup>7</sup>. He may attend or be represented at any meeting of creditors, and is to be given any notice which is required or authorised to be given<sup>8</sup> to creditors; and the statutory requirements as to the lodging or use of proxies<sup>9</sup> do not apply<sup>10</sup>.

He may take part in the public examination of the bankrupt in the case only of an individual adjudged bankrupt on a criminal bankruptcy petition<sup>11</sup> and may question him concerning his affairs, dealings and property and the cause of his failure<sup>12</sup>. The requirements of the Insolvency Rules 1986 with respect to the proof of debts do not, however, apply to the Official Petitioner<sup>13</sup>.

1 For these purposes, 'criminal bankruptcy order' means an order under the Powers of Criminal Courts Act 1973 s 39(1) (repealed); Insolvency Act 1986 s 402(5). As to the abolition of the former power to make criminal bankruptcy orders see para 844 ante; and as to the former power to make such orders see para 847 post. In the Insolvency Act 1986 'criminal bankruptcy order' has the same meaning as in s 402: s 385(1). As to the

prospective repeal of the definition of 'criminal bankruptcy order' in s 385(1) and of s 402 see para 844 note 2 ante.

2 Ibid s 402(1). As to the Director of Public Prosecutions see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 1066. In the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition, s 402 applies: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 36. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq ante.

3 Ie under the Insolvency Act 1986 s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 ante.

4 Ibid s 402(2).

5 Ibid s 402(3).

6 Ie for all purposes of the Insolvency Act 1986 and the Insolvency Rules 1986, SI 1986/1925 (as amended).

7 Ibid r 6.230(1).

8 Ie under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925 (as amended).

9 Ie ibid rr 8.1-8.7 (as amended): see para 278 et seq ante.

10 Ibid r 6.230(2).

11 See note 3 supra.

12 See the Insolvency Act 1986 s 290(4)(a); and para 291 et seq ante.

13 See the Insolvency Rules 1986, SI 1986/1925, r 6.232(3); and para 856 post.

## UPDATE

### 844-858 Criminal bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(1) IN GENERAL/846. Liability of Official Petitioner.

### 846. Liability of Official Petitioner.

Neither the Official Petitioner nor any person acting with his authority<sup>1</sup> is liable to any action or proceeding in respect of anything done or omitted to be done in the discharge, or purported discharge, of the functions<sup>2</sup> of the Official Petitioner<sup>3</sup>.

1 See the Insolvency Act 1986 s 402(3); and para 845 ante. As to the prospective repeal of s 402 see para 844 note 2 ante.

2 See para 845 ante.

3 Insolvency Act 1986 s 402(4). As to the application of s 402 in the case of the administration in bankruptcy of the insolvent estate of a deceased person dying before the presentation of a bankruptcy petition see para 845 note 2 ante.

## UPDATE

## 844-858 Criminal bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(2) CRIMINAL BANKRUPTCY ORDERS/847. Criminal bankruptcy orders.

## (2) CRIMINAL BANKRUPTCY ORDERS

### 847. Criminal bankruptcy orders.

Where a person was convicted of an offence before the Crown Court and it appeared to the court that:

- 1093 (1) as a result of the offence, or of that offence taken together with any other relevant offence or offences<sup>1</sup>, loss or damage, not attributable to personal injury<sup>2</sup>, had been suffered by one or more persons whose identity was known to the court; and
- 1094 (2) the amount, or aggregate amount, of the loss or damage exceeded £15,000<sup>3</sup>,

the court might, in addition to dealing with the offender in any other way, but not if it made a compensation order<sup>4</sup> against him, make a criminal bankruptcy order<sup>5</sup> against him in respect of the offence or, as the case may be, that offence and the other relevant offence or offences<sup>6</sup>.

A criminal bankruptcy order might be made against two or more offenders in respect of the same loss or damage<sup>7</sup>.

1 The power to make a criminal bankruptcy order conferred by the Powers of Criminal Courts Act 1973 s 39 (as amended and repealed: see para 844 note 1 ante) has been abolished on and after 3 April 1989: see para 844 ante. However, as regards criminal bankruptcy orders made before that date, in s 39(1) (repealed) 'other relevant offence or offences' meant an offence or offences of which the person in question was convicted in the same proceedings or which the court took into consideration in determining his sentence: s 39(2) (repealed). Offences 'taken into consideration' was to be restricted to offences admitted expressly and agreed to be taken into consideration by the convicted person in determining sentence: *Anderson v DPP* [1978] AC 964, [1978] 2 WLR 994, sub nom *DPP v Anderson* [1978] 2 All ER 512, HL. See also *Re Riley* (1988) 87 Cr App Rep 125, CA.

2 A person suffering loss or damage attributable to personal injury might make a claim to the Criminal Injuries Compensation Board: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 2035. As from 1 April 1996 a new scheme for compensation for criminal injuries was introduced by the Criminal Injuries Compensation Act 1995; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 2033 et seq.

3 The Secretary of State might by order direct that the Powers of Criminal Courts Act 1973 s 39(1) (repealed) was to be amended by substituting, for the amount there specified as originally enacted or as previously amended, such amount as might be specified in the order: s 39(6) (repealed). As to the making of orders generally see s 54 (repealed).

4 As to compensation orders see *ibid* s 35(1), (1A) (as substituted and repealed).



5 For the meaning of 'criminal bankruptcy order' see para 845 note 1 ante. As to the contents of a criminal bankruptcy order see para 848 post.

6 Powers of Criminal Courts Act 1973 s 39(1) (repealed). The court had jurisdiction under the Supreme Court Act 1981 s 47(2) to vary a convicted person's sentence by making a criminal bankruptcy order: *R v Reilly* [1982] QB 1208, [1982] 3 All ER 27, CA (decided under the Courts Act 1971 s 11(2) (repealed)).

7 Powers of Criminal Courts Act 1973 s 39(4) (repealed).

## UPDATE

### 844-858 Criminal bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

### 847 Criminal bankruptcy orders

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(2) CRIMINAL BANKRUPTCY ORDERS/848. Contents of criminal bankruptcy order.

### 848. Contents of criminal bankruptcy order.

A criminal bankruptcy order had to specify:

- 1095 (1) the amount of the loss or damage appearing to the court to have resulted from the offence or, if more than one, each of the offences<sup>1</sup>;
- 1096 (2) the person or persons appearing to the court to have suffered that loss or damage;
- 1097 (3) the amount of that loss or damage which it appeared to the court that that person, or each of those persons, had suffered; and
- 1098 (4) for the purposes of the Insolvency Act 1986<sup>2</sup>, the date which appeared to the court to be the earliest date on which the offence or, if more than one, the earliest of the offences, was committed<sup>3</sup>.

1 Where a person was convicted of seven offences of dishonesty, and a criminal bankruptcy order was made in a total sum of £35,000 without specifying the amount of the loss appearing to the court to have resulted from each of the seven offences, the subsequent apportionment by the court of the £35,000 between the offences was permissible within the inherent jurisdiction of the Crown Court to remedy mistakes in its record: *R v Saville* [1981] QB 12, [1980] 1 All ER 861, CA.

2 Ie for the purposes of the Insolvency Act 1986 s 341(4): see para 660 ante.

3 Powers of Criminal Courts Act 1973 s 39(3) (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 24; the Insolvency Act 1986 s 439(2), Sch 14; repealed). The power to make a criminal bankruptcy order conferred by the Powers of Criminal Courts Act 1973 s 39 (as amended and repealed) has been abolished on and after 3 April 1989: see para 844 ante. As to the repeal of s 39 (as amended) see para 844 note 1 ante.

## UPDATE

## 844-858 Criminal bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(3) CRIMINAL BANKRUPTCY PROCEEDINGS/849. Criminal bankruptcy petition.

### (3) CRIMINAL BANKRUPTCY PROCEEDINGS

#### 849. Criminal bankruptcy petition.

A petition for a bankruptcy order to be made against an individual may be presented to the court in accordance with the provisions of the Insolvency Act 1986<sup>1</sup> where a criminal bankruptcy order has been made against the individual, by the Official Petitioner or by any person<sup>2</sup> specified in the order<sup>3</sup>. The petition must be presented to the High Court<sup>4</sup>; but this provision does not affect the High Court's power to order that the proceedings be transferred<sup>5</sup>.

The Official Petitioner may (inter alia) make payments, in such cases as he may determine, towards expenses incurred by other persons in connection with proceedings in pursuance of such a petition<sup>6</sup>.

Where a petition in respect of an individual<sup>7</sup> is pending at a time when a criminal bankruptcy order is made against him, or is presented after such an order has been made, the court may, on the application of the Official Petitioner, dismiss the petition if it appears to it appropriate to do so<sup>8</sup>.

1    le the provisions of the Insolvency Act 1986 Pt IX (ss 264-371) (as amended): see para 124 et seq ante.

2    le any person specified in the order made in pursuance of the Powers of Criminal Courts Act 1973 s 39(3) (b) (repealed: see para 844 note 1 ante): see para 848 head (2) ante. As to the Official Petitioner see para 845 ante. The power to make a criminal bankruptcy order conferred by s 39 (as amended and repealed) has been abolished on and after 3 April 1989: see para 844 ante. As to the repeal of s 39 (as amended) see para 844 note 1 ante.

3    See the Insolvency Act 1986 s 264(1)(d); and para 124 head (4) ante. Section 265 (conditions to be satisfied in respect of debtor: see para 125 ante) applies only to a bankruptcy petition under s 264(1)(a) or (b): see s 265(1); and para 125 ante. The Official Petitioner may consider whether, in a case in which a criminal bankruptcy order is made, it is in the public interest that he should himself present a petition under s 264(1)(d): see s 402(2)(a); and para 845 head (1) ante. As to the prospective repeal of ss 264(1)(d), 402 see para 844 note 2 ante.

4    Insolvency Rules 1986, SI 1986/1925, r 6.229(1). Accordingly r 6.9 (as amended) (court in which other petitions to be presented: see para 160 ante) does not apply: r 6.229(1). For the prescribed form of criminal bankruptcy petition see rr 6.229, 12.7, Sch 4, Form 6.79; and for the prescribed form of criminal bankruptcy petition for an insolvency administration order see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 1, Sch 3, Form 3. As to the administration in bankruptcy of the insolvent estates of deceased persons see further para 823 et seq ante.

5    Insolvency Rules 1986, SI 1986/1925, r 6.229(2). As to the transfer of proceedings see para 734 et seq ante.

6    See the Insolvency Act 1986 s 402(2)(c); and para 845 head (3) ante.

7    le under ibid s 264(1)(a)-(c): see para 124 heads (1)-(3) ante.

8 Ibid s 266(4). Section 266(4) is without prejudice to s 266(3) (see para 124 ante): s 266(4). As to the prospective repeal of s 266(4) see para 844 note 2 ante.

## **UPDATE**

### **844-858 Criminal bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(3) CRIMINAL BANKRUPTCY PROCEEDINGS/850. Interim receivership.

### **850. Interim receivership.**

The statutory provisions relating to interim receivership<sup>1</sup> apply in criminal bankruptcy only in so far as they provide for the appointment of the official receiver as interim receiver<sup>2</sup>.

<sup>1</sup> Ie the Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 4 (rr 6.51-6.57) (as amended): see para 224 et seq ante.

<sup>2</sup> Ibid r 6.231. The power to make a criminal bankruptcy order conferred by the Powers of Criminal Courts Act 1973 s 39 (as amended and repealed) has been abolished on and after 3 April 1989: see para 844 ante. As to the repeal of s 39 (as amended) see para 844 note 1 ante.

## **UPDATE**

### **844-858 Criminal bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(3) CRIMINAL BANKRUPTCY PROCEEDINGS/851. Making of bankruptcy order.

### **851. Making of bankruptcy order.**

Subject to the court's general power to dismiss or stay proceedings on a bankruptcy petition<sup>1</sup>, the court must, on production of a copy of the criminal bankruptcy order on which the petition<sup>2</sup> is based, make a bankruptcy order<sup>3</sup>. The fact that an appeal is pending against any conviction by virtue of which a criminal bankruptcy order was made does not affect any proceedings on a petition based on a criminal bankruptcy order<sup>4</sup>.

<sup>1</sup> Ie the Insolvency Act 1986 s 266(3): see para 124 ante.

2     Ile a petition under ibid s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 ante.

3     Ibid s 277(1). See further para 215 ante. As to the giving of notice of the making of the bankruptcy order see the Insolvency Rules 1986, SI 1986/1925, r 6.232(5); and para 856 post. The power to make a criminal bankruptcy order conferred by the Powers of Criminal Courts Act 1973 s 39 (as amended and repealed) has been abolished on and after 3 April 1989: see para 844 ante. As to the repeal of s 39 (as amended) see para 844 note 1 ante; and as to the prospective repeal of the Insolvency Act 1986 s 277 see para 844 note 2 ante.

4     Ibid s 277(2). As to when an appeal against conviction is pending see s 277(3); and para 215 note 3 ante. Section 277(2) is subject to the provisions of Pt IX (ss 264-371) (as amended): s 277(2).

## UPDATE

### 844-858 Criminal bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(3) CRIMINAL BANKRUPTCY PROCEEDINGS/852. Annulment of bankruptcy order.

### 852. Annulment of bankruptcy order.

The court must annul a bankruptcy order made on a petition presented by the Official Petitioner or any person specified in an order in pursuance of the Powers of Criminal Courts Act 1973<sup>1</sup>, if at any time it appears to the court that the criminal bankruptcy order on which the petition was based has been rescinded in consequence of an appeal<sup>2</sup>. The statutory provisions relating to the annulment of a bankruptcy order<sup>3</sup> apply<sup>4</sup> with any necessary modifications<sup>5</sup>.

1     Ile under the Insolvency Act 1986 s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 ante.

2     Ibid s 282(2). As to the court's power to annul a bankruptcy order made against an individual under s 264(1)(a), (b) or (c) (see para 124 heads (1)-(3) ante) where the petition was pending at a time when a criminal bankruptcy order was made against the individual or was presented after such an order was made and no appeal is pending see para 613 ante. As to the prospective repeal of s 282(2) see para 844 note 2 ante.

3     Ile the Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 21 (rr 6.206-6.214) (as amended): see para 615 et seq ante.

4     Ile apply to an application to the court under the Insolvency Act 1986 s 282(2) (see para 614 ante) as they apply to an application under s 282(1) (see para 610 ante).

5     Insolvency Rules 1986, SI 1986/1925, r 6.234(3).

## UPDATE

### 844-858 Criminal bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(3) CRIMINAL BANKRUPTCY PROCEEDINGS/853. Trustee in bankruptcy.

### **853. Trustee in bankruptcy.**

Save for the provisions relating to the release of the official receiver<sup>1</sup> and the power of the court to set aside transactions<sup>2</sup>, the statutory provisions relating to the trustee in bankruptcy<sup>3</sup> do not apply in criminal bankruptcy<sup>4</sup>. Where a bankruptcy order is made on a criminal bankruptcy petition<sup>5</sup>, the official receiver must be trustee of the bankrupt's estate<sup>6</sup>; and, where the official receiver is such trustee, he may not be removed from office by a general meeting of the bankrupt's creditors<sup>7</sup>.

1    Ie the Insolvency Rules 1986, SI 1986/1925, r 6.136: see para 377 ante.

2    Ie *ibid* r 6.147: see para 348 ante.

3    Ie *ibid* Pt 6 Ch 10 (rr 6.120-6.149) (as amended): see para 320 et seq ante.

4    Ibid r 6.234(1) (amended by SI 1987/1919).

5    Ie a petition under the Insolvency Act 1986 s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 ante.

6    See *ibid* s 297(1); and para 323 ante. As to the prospective repeal of s 297(1) see para 844 note 2 ante.

7    See *ibid* s 298(2); and para 361 ante.

## **UPDATE**

### **844-858 Criminal bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(3) CRIMINAL BANKRUPTCY PROCEEDINGS/854. Meetings.

### **854. Meetings.**

The statutory provisions relating to the holding of meetings apply in criminal bankruptcy with certain exceptions<sup>1</sup>.

1    Insolvency Rules 1986, SI 1986/1925, r 6.233(1). The statutory provisions which apply are rr 6.79-6.95 (as amended) (see para 266 et seq ante) save for rr 6.79, 6.80 (first meeting of creditors and business thereat: see paras 266-268 ante), r 6.82(2) (the chairman, if other than the official receiver: see para 271 ante), and r 6.88(2), (3) (as amended) (resolution for appointment of trustee: see para 277 ante): r 6.233(1).

## **UPDATE**

### **844-858 Criminal bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(3) CRIMINAL BANKRUPTCY PROCEEDINGS/855. Creditors' committee.

#### **855. Creditors' committee.**

The statutory provisions relating to the creditors' committee<sup>1</sup> do not apply in criminal bankruptcy<sup>2</sup>.

1 The Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 11 (rr 6.150-6.166) (as amended): see para 329 et seq ante.

2 Ibid r 6.234(2) (amended by SI 1987/1919).

## **UPDATE**

### **844-858 Criminal bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(3) CRIMINAL BANKRUPTCY PROCEEDINGS/856. Proof of bankruptcy debts.

#### **856. Proof of bankruptcy debts.**

The making of a bankruptcy order on a criminal bankruptcy petition<sup>1</sup> does not affect the right of creditors to prove for their debts arising otherwise than in consequence of the criminal proceedings<sup>2</sup>.

A person specified in a criminal bankruptcy order as having suffered loss or damage is to be treated as a creditor of the bankrupt; and a copy of the order is sufficient evidence of his claim, subject to its being shown by any party to the bankruptcy proceedings that the loss or damage actually suffered was more or, as the case may be, less than the amount specified in the order<sup>3</sup>.

The requirements of the Insolvency Rules 1986 with respect to the proof of debts<sup>4</sup> do not apply to the Official Petitioner<sup>5</sup>. In criminal bankruptcy, forms of proof must be sent out by the official receiver within 12 weeks from the making of the bankruptcy order, to every creditor who is known to him, or is identified in the bankrupt's statement of affairs<sup>6</sup>; and, within those 12

weeks, the official receiver must send to every such creditor notice of the making of the bankruptcy order<sup>7</sup>.

Where a bankruptcy order was made<sup>8</sup>, no distribution may be made<sup>9</sup> so long as an appeal is pending<sup>10</sup> against the bankrupt's conviction of any offence by virtue of which the criminal bankruptcy order on which the petition was based was made<sup>11</sup>.

1    Ie under the Insolvency Act 1986 s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 ante.

2    Insolvency Rules 1986, SI 1986/1925, r 6.232(1).

3    Ibid r 6.232(2).

4    Ie ibid Pt 6 Ch 8 (rr 6.96-6.114) (as amended): see para 528 et seq ante.

5    Ibid r 6.232(3). As to the Official Petitioner see para 845 ante.

6    Ibid r 6.232(4) (substituted by SI 1987/1919). The Insolvency Rules 1986, SI 1986/1925, r 6.97 (as amended) (supply of forms for proof of debts: see para 529 ante) does not apply: r 6.233(2).

7    Ibid r 6.232(5).

8    Ie on a petition under the Insolvency Act 1986 s 264(1)(d): see para 124 head (4) ante.

9    Ie under ibid ss 324-326: see para 589 et seq ante.

10   Ie within the meaning of ibid s 277: see para 215 ante. As to the prospective repeal of s 277 see para 844 note 2 ante.

11   See ibid s 327; and para 603 ante. As to the prospective repeal of s 327 see para 844 note 2 ante.

## UPDATE

### 844-858 Criminal bankruptcy

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(3) CRIMINAL BANKRUPTCY PROCEEDINGS/857.  
Discharge from criminal bankruptcy.

### 857. Discharge from criminal bankruptcy.

An individual who was adjudged bankrupt on a petition based on a criminal bankruptcy order<sup>1</sup> may be discharged only by an order of the court<sup>2</sup>.

1    Ie under the Insolvency Act 1986 s 264(1)(d): see para 124 head (4) ante. As to the prospective repeal of s 264(1)(d) see para 844 note 2 ante.

2    Ibid s 279(1)(a). As to discharge from bankruptcy where the discharge is by order of the court see para 630 et seq ante.

## UPDATE

## **844-858 Criminal bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

## **857 Discharge from criminal bankruptcy**

TEXT AND NOTE 2--Insolvency Act 1986 s 279(1)(a) now s 279(6) (s 279 substituted by the Enterprise Act 2002 s 256).

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/2. CRIMINAL BANKRUPTCY/(3) CRIMINAL BANKRUPTCY PROCEEDINGS/858. Avoidance of prior transactions.

## **858. Avoidance of prior transactions.**

The statutory provisions relating to the avoidance of transactions at an undervalue<sup>1</sup> and preferences<sup>2</sup> apply in a criminal bankruptcy.

<sup>1</sup> ie the Insolvency Act 1986 s 339: see para 653 et seq ante.

<sup>2</sup> ie ibid s 340: see para 656 et seq ante.

## **UPDATE**

## **844-858 Criminal bankruptcy**

The terminology used in the Insolvency Rules 1986, SI 1986/1925, has been extensively updated by the amendments made by SI 2010/686. A non-exhaustive list of the terminological alterations is set out in PARA 2 NOTE 5.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/3. COMPOSITIONS AND ARRANGEMENTS APART FROM THE INSOLVENCY ACT 1986; ADMINISTRATION ORDERS/(1) DEEDS OF ARRANGEMENT/(i) General Principles/859. In general.

## **3. COMPOSITIONS AND ARRANGEMENTS APART FROM THE**

### **(1) DEEDS OF ARRANGEMENT**

#### **(i) General Principles**

## **859. In general.**

Independently of bankruptcy law, an insolvent debtor, with the general body of his creditors, or with some of his creditors, or with classes of his creditors, may enter into a valid arrangement



by which, without paying his debts in full, he obtains release from the claims of the arranging creditors, or temporary or permanent freedom from process of law for the recovery of the debts due to them<sup>1</sup>. These arrangements usually take the form either of a composition with creditors, or an assignment of the arranging debtor's property to a trustee for their benefit, and all constitute contracts between the parties thereto<sup>2</sup>.

There are also other forms of arrangement which may be, but are now seldom, used, such as a deed of inspectorship entered into for the purpose of carrying on or winding up a business, or an agreement or letter of licence made or given for the purpose of authorising the debtor, or some other person nominated by his creditors, to manage, carry on, realise or dispose of the debtor's business with a view to the payment of his debts<sup>3</sup>. Many such arrangements will be subject to the provisions of, and will require to be registered under, the Deeds of Arrangement Act 1914<sup>4</sup>. In practice, however, deeds of arrangement are seldom used<sup>5</sup>.

Under the Bankruptcy Act 1914 not only the execution of the deed of arrangement but also several of the preliminary procedural steps<sup>6</sup> prior to its execution constituted an act of bankruptcy on which any dissenting creditor could found a bankruptcy petition<sup>7</sup>. Further, creditors who did not assent to the deed were not bound by it and remained free to pursue any remedies available to them<sup>8</sup>. The provisions in the Insolvency Act 1986 relating to personal insolvency do not re-enact the concept of the act of bankruptcy and to this extent deeds of arrangement are now a more satisfactory method for a debtor to compromise with his creditors. The approved voluntary arrangement under the 1986 Act<sup>9</sup> is, however, likely to prove a far more satisfactory procedure for the debtor who wishes to compound with his creditors.

1 As to the effect of a covenant not to sue see *Bateson v Gosling* (1871) LR 7 CP 9.

2 See paras 861-863 post.

3 See *Marconi's Wireless Telegraph Co v Newman* [1930] 2 KB 292 (where it was held that a deed of inspectorship did not constitute a partnership between the debtor and his creditors, or between the debtor and the inspector and the committee, and that the debtor did not become the agent of the inspector or of the committee to carry on the business, but it remained the business of the debtor).

4 See para 860 post.

5 See the Report of the Review Committee into Insolvency Law and Practice (Cmnd 8558) which in fact recommended the repeal of the Deeds of Arrangement Act 1914.

6 Eg the issue and service of the notice summoning the required meeting of creditors, statements made in the notice, and statements made at the meeting by or on behalf of the debtor.

7 As to acts of bankruptcy see the Bankruptcy Act 1914 s 1 (repealed). Under the Deeds of Arrangement Act 1914 s 24(1) (repealed), where the trustee served a prescribed notice on a creditor of the debtor, that creditor was disentitled to present a bankruptcy petition relying on the execution of the deed or any preparatory act as an act of bankruptcy after the expiration of the period of one month from the service of the notice.

8 As to creditors bound by deeds of arrangement see para 885 post.

9 Ie under the Insolvency Act 1986 Pt VIII (ss 252-263): see para 81 et seq ante.

Halsbury's Laws of England/BANKRUPTCY AND INDIVIDUAL INSOLVENCY (VOLUME 3(2) (2002 REISSUE))/3. COMPOSITIONS AND ARRANGEMENTS APART FROM THE INSOLVENCY ACT 1986; ADMINISTRATION ORDERS/(1) DEEDS OF ARRANGEMENT/(i) General Principles/860. Deeds of arrangement to which the Deeds of Arrangement Act 1914 applies.

## **860. Deeds of arrangement to which the Deeds of Arrangement Act 1914 applies.**

A deed of arrangement to which the Deeds of Arrangement Act 1914 applies includes any instrument<sup>1</sup> of the following classes whether under seal<sup>2</sup> or not:

- 1099 (1) made by, for or in respect of the affairs of a debtor for the benefit of his creditors generally<sup>3</sup>;
- 1100 (2) made by, for or in respect of the affairs of a debtor who was insolvent at the date of the execution of the instrument for the benefit of any three or more of his creditors<sup>4</sup>,

otherwise than in pursuance of the law for the time being in force relating to bankruptcy<sup>5</sup>:

- 1101 (a) an assignment of property<sup>6</sup>;
- 1102 (b) a deed of or agreement for a composition<sup>7</sup>;

and, in cases where creditors of the debtor obtain any control over his property or business:

- 1103 (c) a deed of inspectorship entered into for the purpose of carrying on or winding up a business<sup>8</sup>;
- 1104 (d) a letter of licence authorising the debtor or any other person to manage, carry on, realise or dispose of a business with a view to the payment of debts<sup>9</sup>; and
- 1105 (e) any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise or dispose of the debtor's business with a view to the payment of his debts<sup>10</sup>.

A deed of arrangement by a limited joint stock company is not registrable under the 1914 Act<sup>11</sup>.

1 The Deeds of Arrangement Act 1914 applies only to 'instruments'. It does not apply to oral agreements, and a receipt stating the terms of an oral agreement for a composition is not a deed of arrangement within the 1914 Act so as to require registration: *Hughes and Falconer v Newton* [1939] 3 All ER 869.

Save as otherwise expressly provided by the Deeds of Arrangement Act 1914, nothing in that Act is to be construed as repealing or affects any provision of the law for the time being in force in relation to bankruptcy or gives validity to any deed or instrument which by law is void or voidable: s 24(3) (amended by the Insolvency Act 1985 s 235(3), Sch 10 Pt III).

2 Any rule of law which required a seal for the valid execution of an instrument as a deed by an individual has, except in relation to a corporation sole, been abolished in relation to instruments delivered as a deed on or after 31 July 1990: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b), (10); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 7, 32.

3 Deeds of Arrangement Act 1914 s 1(1)(a). If at the date of execution the debtor was solvent, the deed must be for the benefit of creditors generally. This is a question of fact: *Re Hobbins, ex p Official Receiver* (1899) 6 Mans 212. Such a deed is revocable right up to the time that the fact of execution is communicated to a creditor (*Ellis & Co v Cross* [1915] 2 KB 654) including a creditor who is also trustee (*Beebee & Co v Turner's Successors* (1931) 48 TLR 61).

'Creditors generally' includes all creditors who may assent to, or take the benefit of, a deed of arrangement: Deeds of Arrangement Act 1914 s 30(1). See *Re Rileys Ltd, Harper v Rileys* [1903] 2 Ch 590; *Re Allix, ex p Trustee* [1914] 2 KB 77 (where a deed signed by 13 out of 20 creditors described as 'hereinafter called the creditors' was held to be a deed for the benefit of creditors generally); *Huddersfield Fine Worsteds Ltd v Todd* (1925) 134 LT 82. See also *Trustee of GR Spink (in bankruptcy) v Dicker* (1978) Times, 26 October (deed was void where it was made in favour of only some of the creditors for an inadequate consideration).

4 Deeds of Arrangement Act 1914 s 1(1)(b). For the purpose of determining the number of creditors for whose benefit a deed is made, any two or more joint creditors are to be treated as a single creditor: s 30(2).

5 Ibid s 1(1). The Deeds of Arrangement Act 1914 does not apply to a voluntary arrangement approved under the Insolvency Act 1986 Pt VIII (ss 252-263): s 260(3). As to approved voluntary arrangements see para 81 et seq ante.

6 Deeds of Arrangement Act 1914 s 1(2)(a). For these purposes, 'property' has the same meaning given by the Insolvency Act 1986 s 436 (see para 400 ante): Deeds of Arrangement Act 1914 s 30(1) (amended by the Insolvency Act 1986 s 439(2), Sch 14).

As to whether an instrument is an assignment of property see *Re Halstead, ex p Richardson* [1917] 1 KB 695, CA; *Re Lee, ex p Grunwaldt* [1920] 2 KB 200; *Landsberg v Mendel* [1924] WN 46 (where there was an arrangement by way of assignment of property and also a lump sum composition); *B Lipton Ltd v Bell* [1924] 1 KB 701, CA (where an authority to realise the debtor's property, coupled with a declaration of trust for the application of the proceeds, was held not to be an assignment of property). As to deeds of assignment see para 861 post.

7 Deeds of Arrangement Act 1914 s 1(2)(b); and see *Re Lee, ex p Grunwaldt* [1920] 2 KB 200. As to compositions see para 863 post.

8 Deeds of Arrangement Act 1914 s 1(2)(c).

9 Ibid s 1(2)(d).

10 Ibid s 1(2)(e); and see *Re Wilson* [1916] 1 KB 382 at 398, CA (where it was held that a power of attorney given by the debtor authorising a third party to execute a deed of arrangement under the Deeds of Arrangement Act 1914 was not in itself a deed of arrangement under s 1(2)(e)); *Re Halstead, ex p Richardson* [1916] 2 KB 902; affd [1917] 1 KB 695, CA (assignment of a stockbroker's assets on default to the official assignee of the London Stock Exchange held to be a registrable instrument).

11 *Re Rileys Ltd, Harper v Rileys* [1903] 2 Ch 590. As to voluntary arrangements by companies under the Insolvency Act 1986 Pt I (ss 1-7) see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1170 et seq; and as to schemes of arrangement, reconstruction and amalgamation by companies see COMPANIES vol 15 (2009) PARA 1425 et seq.

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### **861. Deeds of assignment.**

A deed assigning all, or substantially all, of his property to a trustee on trusts declared in the deed, by which the assigned property is to be held and applied for the benefit of the creditors, may be executed by a debtor<sup>1</sup>. The deed may provide for the exercise by the creditors, or by a committee appointed by them, of some control over the trustee's administration of the trust estate, and for the release of the debtor from, or the suspension of, legal proceedings for the recovery of the debts due to the assenting creditors<sup>2</sup>.

The assignment of the debtor's property to a trustee is the voluntary act of the arranging creditor<sup>3</sup>, and the trusts to which the assignment is subject are those which the debtor himself creates on the vesting by him of the property comprised in the assignment in the trustee<sup>4</sup>. The effect of the deed is to release or suspend the operation of creditors' claims by virtue of the assent of creditors to it, and it binds only those creditors who, in writing or otherwise, expressly or impliedly assent to it<sup>5</sup>. Until a deed of assignment to a trustee has been executed by, or has come to the knowledge of, the creditors, the trustee is only an agent for the debtor under a revocable authority to deal with the estate<sup>6</sup>. The bankruptcy of the debtor, before the deed has become operative by virtue of the creditors' assents so as to create a binding trust, revokes and invalidates the trusts of the deed<sup>7</sup>.

In construing a deed of assignment, a special limited condition overrides any general implied condition in the deed<sup>8</sup>; similarly, general words of assignment are controlled by a recital in the deed showing that the assignment was confined to the contents of the schedule<sup>9</sup>.

1 A deed of arrangement may be executed by the donee of a power of attorney given by the debtor for that purpose: *Re Wilson* [1916] 1 KB 382, DC.

2 A trustee of a deed of arrangement is a trust corporation and may, therefore, give a valid receipt on the sale of land: see the Law of Property Act 1925 s 27(2) (substituted by the Law of Property (Amendment) Act 1926 s 7, Schedule; amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(1), (8)(b)) and REAL PROPERTY vol 39(2) (Reissue) para 249; and the Trustee Act 1925 s 14(2) (amended by the Law of Property (Amendment) Act 1926 ss 7, 8(2), Schedule; the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 3(1), (3)) and TRUSTS vol 48 (2007 Reissue) para 1051.

3 *Wallwyn v Coutts* (1815) 3 Mer 707; *Gibbs v Glamis* (1841) 11 Sim 584.

4 *John v James* (1878) 8 ChD 744, CA; cf *Re LG Clarke, ex p Debtor v S Aston & Son Ltd* [1967] Ch 1121, [1966] 3 All ER 622, DC.

5 *Ilderton v Jewell* (1864) 16 CBNS 142; *Benham v Broadhurst* (1864) 3 H & C 472. See also para 885 post.

6 *Acton v Woodgate* (1833) 2 My & K 492; *Harland v Binks* (1850) 15 QB 713; *Re Douglas, ex p Snowball* (1872) 7 Ch App 534; *Re Ashby, ex p Wreford* [1892] 1 QB 872. The fact that a deed of assignment has been executed in pursuance of previous resolutions of, or at the previous request of, the creditors does not, in the absence of its execution being communicated to them, make the deed irrevocable: *Ellis & Co v Cross* [1915] 2 KB 654.

7 See *Smith v Dresser* (1866) LR 1 Eq 651 at 655; *Johns v James* (1878) 8 ChD 744, CA; *Smith v Keating* (1848) 6 CB 136; *R v Humphris* [1904] 2 KB 89 at 97; *R v Creese* (1874) LR 2 CCR 105 at 113. See also *Siggers v Evans* (1855) 5 E & B 367 (where the trustee was also a beneficiary under the deed, and it was held that assent on his part was not necessary to perfect his title); *Re Waley's Trusts* (1855) 3 Drew 165 at 169; *Garrard v Lord Lauderdale* (1831) 2 Russ & M 451; *Gibbs v Glamis* (1841) 11 Sim 584.

8 See *Re Clement, ex p Goas* (1886) 3 Morr 153, CA (where the trustee was empowered, but failed, to declare the deed void on the debtor's defaulting on instalments; and it was held that the deed was not void until he did so, and that the creditors could not petition in bankruptcy).

9 See *Re Moon, ex p Dawes* (1886) 17 QBD 275, CA. As to the interpretation of deeds generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 164 et seq.

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## 862. Modes of assignment.

Arrangements by means of the assignment of a debtor's property to a trustee for the benefit of his creditors are usually effected in one of two ways, either:

1106 (1) where the insolvent debtor, before communicating with his creditors, assigns his property to a trustee selected by himself on trust for their benefit, and then obtains the assent of all or some of his creditors to the arrangement<sup>1</sup>; or

1107 (2) where, before making any assignment, the debtor calls his creditors together to a meeting, or the creditors themselves meet, and the creditors agree to forbear from enforcing their claims, on condition that the debtor assigns his property to a trustee chosen at the meeting, and on trusts of which the creditors approve.

Whichever of these methods is adopted, the assignment becomes operative to create a valid title in the trustee, and validly enforceable trusts for the benefit of the creditors, as soon as the deed has been executed and creditors have assented to it, but subject to the requirements as to registration<sup>2</sup>.

1 For an example see *Re Woodroff, ex p Woodroff* (1897) 4 Mans 46. As to revocation of assent before execution of the deed see *Re Jones Bros, ex p Associated Newspapers Ltd* [1912] 3 KB 234. As to when assents can no longer be revoked see *Re LG Clarke, ex p Debtor v S Aston & Son Ltd* [1967] Ch 1121, [1966] 3 All ER 622, DC.

2 See paras 864, 866 et seq post.

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### 863. Compositions.

A composition is an agreement between the compounding debtor and all or some of his creditors by which the compounding creditors agree with the debtor, and, expressly or impliedly, with each other, to accept from the debtor payment of less than the amounts due to them in full satisfaction of the whole of their claims<sup>1</sup>. A composition agreement may be made orally or in writing, or partly orally and partly in writing<sup>2</sup>. The consideration supporting the agreement which enables the acceptance of part of a debt to operate as a discharge of the whole debt is the mutual agreement of the creditors to forgo part of their claims<sup>3</sup>.

The effect of any particular agreement for a composition depends on its terms<sup>4</sup>. Subject to any statutory provisions, the effect of the composition is that the creditors accept it as a method of paying their debts, failure by the debtor to comply with his obligations under the composition normally entitling the creditors to sue him for the whole of the balance of their debts<sup>5</sup>. Where the effect of the composition is that the creditors accept the debtor's promise with or without a surety in satisfaction of their debts, it seems that, on the debtor's default, the creditors may sue only for the balance of the amount of the composition<sup>6</sup>.

1 *Re Hatton* (1872) 7 Ch App 723 at 726; *Slater v Jones, Capes v Ball* (1873) LR 8 Exch 186 at 193, 194. See also *Re Griffith* (1886) 3 Morr 111 at 116.

2 Where, under a deed of composition and release, the debtor is left in possession of his assets and no trustee is appointed, it would seem that the provisions of the Deeds of Arrangement Act 1914, with regard to the giving of security and the duties of trustees under a deed (see para 871 et seq post), do not apply to the debtor. Compositions may be effected simply by the creditors mutually accepting the composition offered and giving receipts in full.

3 *Norman v Thompson* (1850) 4 Exch 755 at 759 ('it is a good consideration for one to give up part of his claim that another should do the same'); *Carey v Barrett* (1879) 4 CPD 379. See also *Couldery v Bartrum* (1881) 19 ChD 394 at 399, CA. Where the composition is by deed, consideration is not necessary to support it, for the acceptance of less than the amount of a debt in discharge of the whole debt is valid, if made by deed: *Foakes v Beer* (1884) 9 App Cas 605 at 613, HL; applied in *D and C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA.

4 Sometimes the payment of instalments under a composition is secured by an assignment by the debtor of his property on trust, if the instalments are not paid, to realise the property and to apply it towards the satisfaction of the composition. The deed of composition normally contains a release by the creditors of the debts due to them, or an agreement by the creditors not to enforce their claims by legal proceedings, so long as

the instalments are duly paid and the provisions of the agreement are observed by the debtor, with a condition that, on payment of the entire composition, the debtor is released from the whole of the creditors' respective claims. There may also be a proviso that the composition is to be at an end and that the creditors are to regain their original rights if the composition or any instalment is not duly paid or if bankruptcy proceedings are taken against the debtor. Bills of exchange or promissory notes for the amounts payable under the composition might be given to the creditors, or a trustee on their behalf, in which event the agreement to pay the composition should not be by deed, because the obligation of the debtor and sureties on the negotiable instruments might merge in the agreement by deed: *Owen v Homan* (1851) 3 Mac & G 378; affd 4 HL Cas 997.

5 See *Re Hatton* (1872) 7 Ch App 723 (composition under the Bankruptcy Act 1869 (repealed)); cf *Couldery v Bartrum* (1881) 19 ChD 394, CA. See also CONTRACT vol 9(1) (Reissue) para 1048. Time runs against a creditor in respect of his right to sue on the debt only from the date of the debtor's default: *Re Stock, ex p Amos* (1896) 3 Mans 324, following *Irving v Veitch* (1837) 3 M & W 90; and see the Limitation Act 1980 s 29(5) and LIMITATION PERIODS vol 68 (2008) PARA 1184.

6 *Re Hatton* (1872) 7 Ch App 723 at 726.

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#### **864. Avoidance of unregistered deeds of arrangement.**

A deed of arrangement is void<sup>1</sup> unless it is registered<sup>2</sup> within seven clear days<sup>3</sup> after the first execution thereof by the debtor or any creditor, or, if it is executed in any place out of England<sup>4</sup>, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England, if posted within one week after the execution thereof, and unless it bears such stamp as is provided by the Deeds of Arrangement Act 1914<sup>5</sup>.

1 If a deed of arrangement is declared void for want of registration, the money in the hands of the trustee under the instrument passes to the trustee in bankruptcy under an order for the administration of the insolvent estate of a deceased debtor, and, if the instrument is declared void, the release it contains is also void: *Re Lee, ex p Grunwaldt* [1920] 2 KB 200. As to the recovery of moneys expended by the trustee see *Re Zakon, ex p Trustee v Bushell* [1940] Ch 253, [1940] 1 All ER 263.

2 The deed of arrangement must be registered with the Registrar of Bills of Sale: Deeds of Arrangement Act 1914 s 2. The Registrar of Bills of Sale has been replaced for the purposes of registration under the 1914 Act by a registrar appointed by the Board of Trade: see the Administration of Justice Act 1925 s 22(1). As to registration see para 866 et seq post.

The Board of Trade is still mentioned in many statutes and still theoretically exists. However, in time its functions came to be exercised mainly by its President. The office of President of the Board of Trade is now held by the Secretary of State for Trade and Industry, who exercises the President's functions concurrently and has reverted to using the title: see the Secretary of State for Trade and Industry Order 1970, SI 1970/1537, art 2(1) (b); Department of Trade and Industry Press Notice P/92/241, dated 1 April 1992; and TRADE AND INDUSTRY vol 97 (2010) PARA 802.

3 As to the extension of this time limit see para 868 post. Where the time for registering a deed of arrangement expires on a Sunday, or other day on which the registration office is closed, the registration is valid if made on the next following day on which the office is open: Deeds of Arrangement Act 1914 s 8.

4 A deed executed in Scotland under Scots law by a debtor domiciled in England does not require registration in Scotland and is valid in England: *Re Pilkington's Will Trusts* [1937] Ch 574, [1937] 3 All ER 213. See also *Dulaney v Merry & Son* [1901] 1 KB 536.

5 Deeds of Arrangement Act 1914 s 2 (amended by the Finance Act 1949 s 52, Sch 11 Pt V).

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### **865. Avoidance of deeds of arrangement unless assented to by a majority of creditors.**

A deed of arrangement which either is expressed to be or is in fact for the benefit of a debtor's creditors generally<sup>1</sup> is void unless, before or within 21 days after its registration, or within such extended time as may be allowed<sup>2</sup>, it has received the assent<sup>3</sup> of a majority<sup>4</sup> in number and value of the creditors of the debtor<sup>5</sup>. The list of creditors annexed to the affidavit of the debtor filed on registration of the deed of arrangement is prima facie evidence of the names of the creditors and the amounts of their claims<sup>6</sup>.

The trustee must file<sup>7</sup> at the time of the registration of a deed of arrangement, or in the case of a deed of arrangement assented to after 28 days of registration, within 28 days after registration or within such extended time as may be allowed<sup>8</sup> a statutory declaration by the trustee that the requisite majority of the creditors of the debtor have assented to the deed of arrangement, which declaration is, in favour of a purchaser for value, conclusive evidence, and, in other cases, prima facie evidence, of the fact declared<sup>9</sup>.

1 For the meaning of 'creditors generally' see para 860 note 3 ante.

2 I.e. by the High Court or the court having jurisdiction for the purposes of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) in relation to the district in which the debtor resided or carried on business at the date of the execution of the deed. As to the courts having such jurisdiction see paras 6, 7 ante.

3 The assent of a creditor for these purposes is established by his executing the deed of arrangement or sending to the trustee his assent in writing attested by a witness, but not otherwise: Deeds of Arrangement Act 1914 s 3(3).

4 In calculating a majority of creditors for these purposes, a creditor holding security on the property of the debtor is to be reckoned as a creditor only in respect of the balance, if any, due to him after deducting the value of such security; and creditors whose debts amount to sums not exceeding £10 are to be reckoned in the majority in value but not in the majority in number: *ibid* s 3(5). In calculating the majority in number of creditors, creditors for debts not exceeding £10 must be eliminated from the total number of creditors as well as from the majority: *Re Wilson* [1916] 1 KB 382, overruled at [1916] 1 KB 382 at 398, CA purely on the point of jurisdiction of the Divisional Court in entertaining the appeal in the circumstances of that case, the above point not being considered.

5 Deeds of Arrangement Act 1914 s 3(1) (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 2(2); the Insolvency Act 1986 s 439(2), Sch 14). For the prescribed form of assent see the Deeds of Arrangement Rules 1925, SR & O 1925/795, r 4(1), Appendix, Form 2.

6 Deeds of Arrangement Act 1914 s 3(2).

7 I.e. with the Registrar of Bills of Sale: see para 864 note 2 ante.

8 See note 2 *supra*.

9 Deeds of Arrangement Act 1914 s 3(4). For the prescribed form of statutory declaration see the Deeds of Arrangement Rules 1925, SR & O 1925/795, Appendix, Form 3.

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## (ii) Registration of Deeds of Arrangement

### 866. Mode of registration.

The registration<sup>1</sup> of a deed of arrangement under the Deeds of Arrangement Act 1914 must be effected by presenting and filing<sup>2</sup> a true copy<sup>3</sup> of the deed, and of every schedule or inventory annexed to it or referred to in it, within seven clear days<sup>4</sup> after the execution of the deed, together with an affidavit<sup>5</sup> verifying the time of execution, and containing a description of the residence and occupation of the debtor, and of the place or places where his business is carried on, and an affidavit<sup>5</sup> by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition, if any, payable thereunder, and the names and addresses of his creditors<sup>6</sup>.

No deed may be so presented unless the original of the deed, duly stamped with the proper inland revenue duty, is produced<sup>7</sup> at the time of such registration<sup>8</sup>.

An assignment of property by a debtor to a trustee or assignee for the benefit of his creditors may not be so registered unless it appears from the assignment that it has been or purports to have been executed or, if not made by deed, signed by the trustee or assignee<sup>9</sup>.

The prescribed fees must be paid on registration<sup>10</sup>.

1 As to the need for registration see para 864 ante.

2 Ie with the Registrar of Bills of Sale: see para 864 note 2 ante.

3 The Deeds of Arrangement Act 1914 s 5(1) (as amended) has effect as if it provided that there are to be presented to the registrar such number of copies of the deed and of every schedule or inventory annexed thereto or referred to therein as he may deem to be necessary for the purpose of carrying out the requirements of the 1914 Act: Administration of Justice Act 1925 s 22(2). On every copy of a deed which is presented for filing there must be indorsed, by the person who presents it, the name of the debtor, the date of the deed and of the filing thereof, the total amount of duty with which the deed is stamped and a certificate signed by the solicitor of the debtor or the person who presents the copy for filing certifying that the copy is a correct copy of the deed: Deeds of Arrangements Rules 1925, SR & O 1925/795, r 6. For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

4 As to the position where the time limit expires on a Sunday or other day on which the registration office is closed see para 864 note 3 ante; and as to the extension of the time limit see para 868 post.

5 The affidavits to be made pursuant to the Deeds of Arrangement Act 1914 s 5 (as amended) must be filed with the registrar: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 5. For the prescribed forms of affidavit see r 4(1), Appendix, Form 4 (affidavit of execution by debtor), Form 5 (affidavit of execution where deed is first executed by creditors), Form 6 (debtor's affidavit, with schedule of creditors).

These affidavits may not be sworn before the solicitor to the trustee of the deed, or the deed, although registered, will be void: *Re Bagley* [1911] 1 KB 317. The deed will be void if the debtor's affidavit is sworn by a donee of his power of attorney instead of by the debtor personally: *Re Wilson* [1916] 1 KB 382. The affidavit need not include the names and addresses of secured creditors (*Chaplin v Daly* (1894) 71 LT 569); and, if, without fraud, the names and addresses of some of the creditors that should be included are omitted, the registration is not rendered void (*Maskelyne and Cooke v Smith* [1903] 1 KB 671). As to when the debtor's affidavit will be dispensed with see *Re X (An Arranging Debtor)* (1910) 44 ILT 167.

6 Deeds of Arrangement Act 1914 s 5(1) (amended by the Administration of Justice Act 1925 s 29, Sch 5). When a deed is so registered, there must be written on the original deed a certificate stating that the deed has been duly registered as prescribed by the Deeds of Arrangement Act 1914, and the date of registration; and such certificate must be sealed with the seal of the registrar: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 8.

7 Ie to the Registrar of Bills of Sale: see para 864 note 2 ante.



8 Deeds of Arrangement Act 1914 s 5(2) (amended by the Finance Act 1949 s 52(10), Sch 11 Pt V). Where the deed takes the form of an assignment for the benefit of creditors, the appropriate inland revenue duty is £5: see the Finance Act 1999 s 112(3), Sch 13 para 16(1), (2); and STAMP DUTIES AND STAMP DUTY RESERVE TAX. Any provision for stamp duty to be determined by reference to Sch 13 para 16 has effect in accordance with the Variation of Stamp Duties Regulations 2001, SI 2001/3746, regs 1-6: see reg 7(2); and STAMP DUTIES AND STAMP DUTY RESERVE TAX. If there are no assets, the trustee must pay the stamp himself: *Re Hertage* (1896) 3 Mans 297.

9 Deeds of Arrangement Rules 1925, SR & O 1925/795, r 7.

10 Deeds of Arrangement Act 1914 s 26(1). Nothing in the 1914 Act makes it obligatory on the registrar to do, or permit to be done, any act in respect of which any fee is specified or prescribed, except on payment of such fee: s 26(1). For the prescribed fees see the Deeds of Arrangement Fees Order 1984, SI 1984/887, art 3(2), Schedule, Fees 4-6. The fees must be taken in cash: art 3(3).

## UPDATE

### 866 Mode of registration

NOTE 3--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

NOTE 10--SI 1984/887 art 3 amended: SI 2007/3224, SI 2009/2748.

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### 867. Procedure on registration.

The registrar must keep a register wherein must be entered, as soon as conveniently may be after the presentation of a deed for registration<sup>1</sup>, an abstract of the contents of every deed of arrangement registered, containing the following and any other prescribed particulars:

- 1108 (1) the date of the deed;
- 1109 (2) the name, address and description of the debtor, and the place or places where his business was carried on at the date of the execution of the deed, and the title of the firm or firms under which the debtor carried on business, and the name and address of the trustee, if any, under the deed;
- 1110 (3) the date of registration;
- 1111 (4) the amount of property and liabilities included under the deed, as estimated by the debtor<sup>2</sup>.

When a deed is so registered, there must be written on the original deed a certificate stating that the deed has been duly registered and the date of registration; and such certificate must be sealed with the seal of the registrar<sup>3</sup>.

Where the place of business or residence of the debtor who is one of the parties to a deed of arrangement, or who is referred to therein, is situated in some place outside the London bankruptcy district<sup>4</sup>, the registrar must, within three clear days after registration, and in accordance with the prescribed directions, transmit a copy of the deed to the district judge of the county court in the district of which such place of business or residence is situated; and every copy so transmitted must be filed, kept and indexed by the district judge<sup>5</sup>.

- 1 le under the Deeds of Arrangement Act 1914 s 5 (as amended): see para 866 ante.
- 2 Ibid s 6 (amended by the Administration of Justice Act 1925 ss 22(3), 29, Sch 5). For the prescribed form of the register see the Deeds of Arrangement Rules 1925, SR & O 1925/795, r 4(1), Appendix, Form 7.
- 3 Ibid r 8.
- 4 'The London bankruptcy district' is now 'the London insolvency district': see para 7 note 1 ante.
- 5 Deeds of Arrangement Act 1914 s 10; Deeds of Arrangement Rules 1925, SR & O 1925/795, r 10; Courts and Legal Services Act 1990 s 74(1)(a). On every copy of a deed which is so transmitted to a district judge there must be written copies of every indorsement or certificate written on the original deed or on the filed copy thereof; and such copies must be signed by the Registrar of Bills of Sale (see para 864 note 2 ante) or by some other person duly authorised by him: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 11; Courts and Legal Services Act 1990 s 74(1)(a). The copy of a deed which is required to be transmitted to a district judge may be transmitted to him by post: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 12; Courts and Legal Services Act 1990 s 74(1)(a). The district judge must number the copies of deeds received by him in the order in which they are respectively received, and must file and keep them in his office: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 13; Courts and Legal Services Act 1990 s 74(1)(a). Where a debtor who is one of the parties to a deed of arrangement or who is referred to therein has a place of business or residence in some place outside the London bankruptcy district (see note 4 supra), there must be furnished to the Registrar of Bills of Sale sufficient copies of the deed of arrangement to enable him to transmit a copy to the district judge of each district in which such place of business or residence is situated: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 14; Courts and Legal Services Act 1990 s 74(1)(a). The district judge must keep an index, alphabetically arranged, in which he must enter, under the first letter of the surname of the debtor, such surname, with his Christian name, address and description, and the number which has been affixed to the copy: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 15; Courts and Legal Services Act 1990 s 74(1)(a). The Deeds of Arrangement Act 1914 ss 9, 25 (see para 869 post) apply to all documents filed with the registrar pursuant to the 1914 Act or the Deeds of Arrangement Rules 1925, SR & O 1925/795 (as amended): r 16.

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### **868. Rectification of the register.**

On being satisfied that the omission to register a deed of arrangement within the time required<sup>1</sup> or that the omission or misstatement of the name, residence or description of any person was accidental, or due to inadvertence, or to some cause beyond the control of the debtor and not imputable to any negligence on his part, the High Court or a judge thereof may, on the application of any party interested, and on such terms and conditions as are just and expedient, extend the time for registration, or order the omission or misstatement to be supplied or rectified by the insertion in the register of the true name, residence or description<sup>2</sup>.

- 1 le the time required by the Deeds of Arrangement Act 1914 s 2 (as amended): see para 864 ante.
- 2 Ibid s 7. Where a debtor becomes mentally incapable of swearing the affidavit leading to registration, the court will order an extension of the prescribed time: *Re X (An Arranging Debtor)* (1910) 44 ILT 167.  
Every application to the court under the Deeds of Arrangement Act 1914 s 7 must be made by witness statement or affidavit without notice being served on any other party to a master of the Queen's Bench Division: CPR Sch 1, RSC Ord 94 r 4(1). The witness statement or affidavit must set out particulars of the deed of arrangement and of any omission or misstatement in question and must state the grounds on which the application is made: CPR Sch 1, RSC Ord 94 r 4(2).

## **UPDATE**

### **868 Rectification of the register**

NOTE 2--CPR Sch 1, RSC Ord 94 r 4 revoked: SI 2007/2204.

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### **869. Searches and office copies.**

On payment of the prescribed fee, any person is entitled, at all reasonable times, to search the register<sup>1</sup>, and, subject to such regulations as may be prescribed, to inspect, examine and make extracts<sup>2</sup> from any registered deed of arrangement, without being required to make a written application or to specify any particulars in reference thereto, on payment of the prescribed fee for each deed of arrangement inspected<sup>3</sup>. On payment of the prescribed fee, the index kept by the district judge of the county court may be searched and the same extracts made from any instrument filed by him as are permitted in the case of registered instruments<sup>4</sup>.

On payment of the prescribed fees, any person is entitled to an office copy or extract from any registered instrument or document filed with the registrar, or to an office copy of an instrument filed by the district judge<sup>5</sup>.

In all courts and before all arbitrators and other persons an office copy of or extract from a registered instrument is prima facie evidence of the instrument and of the fact and date of registration<sup>6</sup>.

1    le the register maintained under the Deeds of Arrangement Act 1914 s 6: see para 867 ante.

2    The extracts must be limited to the dates of execution and of registration, the names, addresses and descriptions of the debtor and of the parties to the deed, a short statement of the nature and effect of the deed, and any other prescribed particulars: *ibid* s 9 proviso; Deeds of Arrangement Rules 1925, SR & O 1925/795, r 9.

3    Deeds of Arrangement Act 1914 ss 9, 26(1); Deeds of Arrangement Rules 1925, SR & O 1925/795, rr 9, 16. For the prescribed fees see the Deeds of Arrangement Fees Order 1984, SI 1984/887, art 3, Schedule, Fee 8.

4    Deeds of Arrangement Act 1914 s 10(2); Deeds of Arrangement Rules 1925, SR & O 1925/795, r 10; Courts and Legal Services Act 1990 s 74(1)(a). Extracts must be limited as mentioned in note 2 *supra*: see r 9.

5    Deeds of Arrangement Act 1914 ss 10, 25; Deeds of Arrangement Rules 1925, SR & O 1925/795, rr 10, 16; Courts and Legal Services Act 1990 s 74(1)(a).

6    Deeds of Arrangement Act 1914 s 25; Deeds of Arrangement Rules 1925, SR & O 1925/795, r 16.

### **UPDATE**

### **869 Searches and office copies**

NOTE 3--SI 1984/887 art 3 amended: SI 2007/3224, SI 2009/2748.

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## 870. Registration under other statutes.

Where unregistered land is affected by a deed of arrangement, the deed should be registered in the name of the debtor under the Land Charges Act 1972<sup>1</sup>; and, if it is not so registered, it is void as against a purchaser of any land comprised in it or affected by it<sup>2</sup>. A deed of arrangement affecting registered land or a registered charge on land should be protected by a caution on the register of title<sup>3</sup>; and, if it is not so protected, it is void against a purchaser<sup>4</sup>.

Deeds of arrangement intended for the benefit of creditors generally are incapable of registration under the Bills of Sale Acts<sup>5</sup>.

1 See the Land Charges Act 1972 s 7(1); and LAND CHARGES vol 26 (2004 Reissue) para 662. Registration may be made on the application of the trustee of the deed or a creditor assenting to or taking the benefit of the deed: s 7(1). The registration may be vacated pursuant to an order of the High Court: see ss 1(6), 17(1); and LAND CHARGES vol 26 (2004 Reissue) para 666. Registration ceases to have effect at the end of the period of five years but may be renewed from time to time, and, if so renewed, has effect for five years from the date of renewal: see s 8 and LAND CHARGES vol 26 (2004 Reissue) para 665; cf *Re A Receiving Order (in Bankruptcy)* [1947] Ch 498, [1947] 1 All ER 843 (decided under the Land Charges Act 1925 s 6 (repealed)).

2 See the Land Charges Act 1972 s 7(2); and LAND CHARGES vol 26 (2004 Reissue) para 664.

3 See the Land Registration Act 1925 s 59(1), (5) (amended by the Finance Act 1975 ss 52(2), 59(5), Sch 13 Pt I) LAND REGISTRATION.

4 See the Land Registration Act 1925 ss 59(6), 110(7) LAND REGISTRATION.

5 See the Bills of Sale Act 1878 s 4; the Bills of Sale Act (1878) Amendment Act 1882 s 3; *Johnson v Oseinton* (1869) LR 4 Exch 107 (where it was held that a deed intended to operate under the Bankruptcy Acts, which, owing to irregularity, did not do so, was still a good deed, and for the benefit of creditors, and did not come under the Bills of Sale Acts); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1620 et seq. See also *General Furnishing and Upholstery Co v Venn* (1863) 2 H & C 153 (where the terms of the deed were wide enough to admit all creditors, and it was held to fall outside the Bills of Sale Acts).

## UPDATE

### 870 Registration under other statutes

TEXT AND NOTES 3, 4--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

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## (iii) Trustees under Arrangements

### 871. Trustee to be insolvency practitioner.

A person who acts as trustee under a deed which is a deed of arrangement made for the benefit of an individual's creditors must be qualified to act as an insolvency practitioner in relation to that individual<sup>1</sup>.

<sup>1</sup> Insolvency Act 1986 s 388(2)(b). As to insolvency practitioners and their qualification see para 42 et seq ante.

## UPDATE

### 871 Trustee to be insolvency practitioner

NOTE 1--Nothing in the 1986 Act s 388 applies to anything done (whether in the United Kingdom or elsewhere) in relation to insolvency proceedings under EC Council Regulation 1346/2000 in a member state other than the United Kingdom: 1986 Act s 388(6) (added by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240).

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### 872. Trustee's duty to give security; bank account.

Within seven days<sup>1</sup> from the date of filing the statutory declaration certifying the creditors' assent<sup>2</sup>, the trustee under a deed of arrangement must give security in the prescribed manner<sup>3</sup> to the registrar of the court having bankruptcy jurisdiction<sup>4</sup> in relation to the district in which the debtor resided or carried on business as at the date of the execution of the deed, or, if he then resided or carried on business in the London insolvency district<sup>5</sup>, to the senior bankruptcy registrar of the High Court, in a sum equal to the estimated assets available for distribution amongst the unsecured creditors as shown by the affidavit filed on registration<sup>6</sup>, to administer the deed properly and account fully for the assets which come to his hands<sup>7</sup>.

The giving of this security may be dispensed with if a majority in number and value of the creditors<sup>8</sup>, either by resolution passed at a meeting convened by notice to all the creditors, or writing addressed to the trustee, so resolve<sup>9</sup>; and, in that event, the trustee must forthwith file with the registrar a statutory declaration to that effect, which will, in favour of a purchaser for value, be conclusive evidence, and in other cases be prima facie evidence, of the facts declared<sup>10</sup>.

If the trustee fails to comply with the above requirements, the court, on the application of any creditor and after hearing such persons as it thinks fit, may declare the deed void or may make an order appointing another trustee<sup>11</sup>. A certificate that the required security has been given, signed by the registrar of the court and filed with the registrar of deeds of arrangement, is conclusive evidence of the fact<sup>12</sup>.

The security must be a bond of a guarantee society accepted by the registrar of the court, and a cover note must be accepted by the registrar as a temporary security, pending the preparation of the bond<sup>13</sup>. If the trustee fails to pay the annual premium, or if the society refuses to accept the premium, the society may apply to the registrar of the court to determine its liability under the bond<sup>14</sup>.

All money received by the trustee must be banked by him to an account to be opened in the name of the debtor's estate<sup>15</sup>.

<sup>1</sup> The court cannot extend the seven days' limit: *Re Early, Smith and Pavey, ex p Trustee* (1928) 98 LJ Ch 34.

<sup>2</sup> As to filing the statutory declaration see para 865 ante.

3 See the Deeds of Arrangement Rules 1925, SR & O 1925/795, rr 24-26, Appendix, Forms 9-11. For the prescribed fee on applying to give security see the Deeds of Arrangement Fees Order 1984, SI 1984/887, art 3, Schedule, Fee 1.

4 le under the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

5 For the meaning of 'the London insolvency district' see para 7 note 1 ante.

6 See para 866 ante.

7 Deeds of Arrangement Act 1914 s 11(1) (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 2(3); the Insolvency Act 1986 s 439(2), Sch 14). As to a limitation on this provision see para 879 post.

A person is not qualified to act as an insolvency practitioner in relation to another person at any time unless there is in force at that time security, or in Scotland, caution for the proper performance of his functions, and that security or caution meets the prescribed requirements with respect to his so acting in relation to that other person: see the Insolvency Act 1986 s 390(3); and para 47 ante. See further para 54 ante. It is apprehended that the obligation to provide such security is concurrent with the obligation under the Deeds of Arrangement Act 1914. When security has been given by a trustee pursuant to s 11(1) (as so amended), the registrar of the court to whom it is given must, within three days after receipt thereof, send to the Registrar of Bills of Sale (see para 864 note 2 ante) a certificate signed by him certifying that the security has been given and the registrar must forthwith file the same: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 26.

8 In calculating a majority of creditors for these purposes, a secured creditor is to be reckoned as a creditor only in respect of the balance, if any, due to him after deducting the value of his security, and creditors whose debts amount to sums not exceeding £10 are to be reckoned in the majority in value but not in the majority in number: Deeds of Arrangement Act 1914 s 11(5).

9 Ibid s 11(1) (as amended: see note 7 supra).

10 Ibid s 11(1) proviso. For the prescribed form of statutory declaration see the Deeds of Arrangement Rules 1925, SR & O 1925/795, r 4(1), Appendix, Form 8.

11 Deeds of Arrangement Act 1914 s 11(2) (amended by the Insolvency Act 1985 Sch 8 para 2(3); the Insolvency Act 1986 Sch 14). As to the appointment of a new trustee see para 880 post.

The registrar of the court must send to the Registrar of Bills of Sale (see para 864 note 2 ante) within three days after any order made under the Deeds of Arrangement Act 1914 s 11(2) (as so amended) has been perfected a copy of such order: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 26.

12 Deeds of Arrangement Act 1914 s 11(3).

13 Deeds of Arrangement Rules 1925, SR & O 1925/795, r 24. Every trustee, on giving security for the due administration of the deed and for accounting fully for the assets, must produce and hand to the registrar of the court to whom the security is to be given an office copy of the affidavit of the debtor filed on the registration of the deed and the registrar of the court must file such office copy: r 25.

14 Ibid r 23. Notice of any such application must be served on the three largest creditors named in the affidavit filed on registration of the deed not less than eight days before the day appointed for the hearing of the application; and any such creditors may appear and be heard thereon: r 23. As to the procedure on such an application see para 891 post.

15 Deeds of Arrangement Act 1914 s 11(4).

## **UPDATE**

### **872 Trustee's duty to give security; bank account**

NOTE 3--SI 1984/887 art 3 amended: SI 2007/3224, SI 2009/2748.

ADMINISTRATION ORDERS/(1) DEEDS OF ARRANGEMENT/(iii) Trustees under Arrangements/873. Trustee's duties towards creditors.

### **873. Trustee's duties towards creditors.**

When an assignment for the benefit of creditors has become operative and valid, the creditors become the beneficiaries, and the trustee under the deed is to be treated as a trust corporation<sup>1</sup> with the powers provided under the Trustee Act 1925<sup>2</sup>; thus, though not specifically authorised by the deed, he may compromise and treat a creditor as a preferential creditor<sup>3</sup>.

His duty is to ascertain all the persons entitled to the benefit of the trusts and the validity of their claims, and to administer the trust estate in accordance with the trusts declared in the deed. If out of the assigning debtor's property he pays to any creditor a sum larger in proportion to the creditor's claim than that paid to other creditors entitled to the benefit of the deed, then, unless the deed authorises him to do so, or unless such payments are either made to a creditor entitled to enforce his claim by distress or are such as would be lawful in a bankruptcy, he is guilty of an offence<sup>4</sup>.

Questions arising in the administration of the trust estate are determined by the court having jurisdiction<sup>5</sup> in the district in which the debtor resided or carried on business at the date of the execution of the deed<sup>6</sup>.

1 See the Law of Property (Amendment) Act 1926 s 3 (as amended); and TRUSTS vol 48 (2007 Reissue) para 798. See also para 861 note 2 ante.

2 See the Trustee Act 1925 s 15 (as amended); and TRUSTS vol 48 (2007 Reissue) para 1052.

3 *Re Shenton* [1935] Ch 651.

4 Deeds of Arrangement Act 1914 s 17. For a limitation on the application of this provision see para 879 post. The Criminal Law Act 1967 s 1(1) abolished the distinction between felonies and misdemeanours. An offence under the Deeds of Arrangement Act 1914 s 17 is triable either summarily or on indictment: see the Magistrates' Courts Act 1980 s 17, Sch 1 para 16; and MAGISTRATES vol 29(2) (Reissue) para 655.

5 See under the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended).

6 See para 890 post. Where a trustee failed to give priority to preferential creditors according to express trusts in the deed, a declaration of breach of trust was made: *Re Moss, Westminster Corp v Reubens* [1935] WN 171. A trustee who desires to contract on terms that he is not to be personally liable must clearly express the limitation; a mere description of him as 'trustee' is insufficient: *Hunt Bros v Colwell* [1939] 4 All ER 406, CA.

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### **874. Transmission of accounts to Department of Trade and Industry.**

At the prescribed times<sup>1</sup> a trustee<sup>2</sup> under a deed of arrangement must send to the Department of Trade and Industry, or as the Department directs, an account, in the prescribed form, of his receipts and payments as trustee, verified by affidavit and duly stamped<sup>3</sup>. If any trustee fails to transmit such account, he is liable on summary conviction to a fine not exceeding £5 for each day during which the default continues and, in addition, is guilty of contempt of court and liable to be punished accordingly<sup>4</sup>.

The Department may require a trustee to complete or amend an account which appears to the Department imperfect, or to furnish an explanation of an account; and the requirement is enforceable in the same manner as the transmission of accounts<sup>5</sup>.

If, since becoming trustee or transmitting his last account, a trustee has not received or paid out any money on account of the estate, he must, at the period when he is required to transmit his account, send to the Department an affidavit of no receipts or payments<sup>6</sup>.

As soon as the trustee has realised all the property included in the deed or so much as can probably be realised, and has distributed a final dividend or final instalment of composition, or in any other case as soon as the trusts of the deed and the trustee's obligations have been completely fulfilled, he must transmit his final account and a verifying affidavit<sup>7</sup>.

1 The first account must be sent within 30 days from the expiration of 12 months from the date of registration of the deed, and must commence at the date of its execution and be brought down to the end of 12 months from the date of registration; subsequent accounts must be sent at intervals of 12 months and must be brought down to the end of the 12-month period for which they are sent: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 31.

2 In the Deeds of Arrangement Act 1914 s 13 the expression 'trustee' includes any person appointed to distribute a composition or to act in any fiduciary capacity under any deed of arrangement: s 13(4) (amended by the Administration of Justice Act 1925 s 29, Sch 5).

3 Deeds of Arrangement Act 1914 s 13(1). For the prescribed form of trustee's account of receipts and payments see the Deeds of Arrangement Rules 1925, r 4(1), Appendix, Form 15 (amended by SR & O 1941/1253). See further para 875 post. For the prescribed fee see the Deeds of Arrangement Fees Order 1984, SI 1984/887, art 3, Schedule, Fee 9. As to the affidavit verifying the accounts see the Deeds of Arrangement Rules 1925, SR & O 1925/795, r 42, Appendix, Form 17; as to the swearing of affidavits respecting accounts see r 42; as to the submission of a summary or modified statement of accounts see r 41; and as to inspection of accounts by the debtor or the creditors see para 886 post.

4 Deeds of Arrangement Act 1914 s 13(2) (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 2(4)). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq.

5 See the Deeds of Arrangement Rules 1925, SR & O 1925/795, r 38.

6 See *ibid* r 39. Even if there are no assets, the trustee must stamp the account: *Re Hertage* (1896) 3 Mans 297.

7 See the Deeds of Arrangement Rules 1925, SR & O 1925/795, r 40. For the prescribed form of affidavit see Appendix, Form 20.

## UPDATE

### 874 Transmission of accounts to Department of Trade and Industry

NOTE 3--SI 1984/887 art 3 amended: SI 2007/3224, SI 2009/2748.

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### 875. Form of accounts.

Each receipt and payment must be entered in the trustee's accounts in such a manner as sufficiently to explain its nature<sup>1</sup>. Where the trustee carries on a business, he must transmit a



separate trading account, and only enter the total receipts and payments in his yearly account<sup>2</sup>. He must enter his petty expenses in sufficient detail to show that no estimated charges are made<sup>3</sup>. Where property has been realised, the gross proceeds of sale must be entered under receipts and the necessary disbursements and charges as payments<sup>4</sup>.

Where dividends or instalments of composition are distributed, the total amount of each dividend or instalment must be entered in the account as one sum; the trustee must forward to the Department of Trade and Industry, with each account in which a charge in respect of dividends or composition appears, a statement showing the amount of each creditor's claim and the amount of dividend or composition payable to each creditor, distinguishing in the statement the dividends or instalments paid and those remaining unpaid; with his final account he must forward a complete statement in similar form, showing the amount of the claim and the full amount of the dividend or composition paid to or reserved for each creditor<sup>5</sup>.

In the case of a partnership, separate accounts must be kept of the joint and separate estates<sup>6</sup>.

1 Deeds of Arrangement Rules 1925, SR & O 1925/795, r 32. For the prescribed form of trustee's account of receipts and payments see r 4(1), Appendix, Form 15 (amended by SR & O 1941/1253).

2 Deeds of Arrangement Rules 1925, SR & O 1925/795, r 33. For the prescribed form of trustee's trading account see Appendix, Form 18.

3 Ibid r 34.

4 Ibid r 35.

5 Ibid r 36. For the prescribed form of list of dividends or compositions see Appendix, Form 19.

6 Ibid r 37.

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## **876. Transmission of accounts to creditors.**

At the expiration of six months from the date of the registration of a deed of arrangement, and at the expiration of every subsequent period of six months until the estate has been finally wound up, the trustee must send to each creditor who has assented to the deed a statement in the prescribed form of his accounts and of the proceedings under the deed down to the date of the statement<sup>1</sup>. In his affidavit verifying his accounts he must state whether or not he has duly sent such statements, and the dates on which they were sent; and, if a trustee fails to comply with any of the above provisions, he is guilty of contempt of court and liable to be punished accordingly<sup>2</sup>.

1 Deeds of Arrangement Act 1914 s 14. For a limitation on the application of this provision see para 879 post. For the prescribed forms see the Deeds of Arrangement Rules 1925, SR & O 1925/795, r 4(1), Appendix, Form 13 (statement of accounts to be sent to creditors), Form 17 (affidavit verifying trustee's accounts).

2 Deeds of Arrangement Act 1914 s 14 (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 2(5)). As to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) para 401 et seq.

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### **877. Audit of accounts.**

Where, in the course of the administration of the estate of a debtor who has executed a deed of arrangement, or within 12 months from the date when the final accounts were rendered, written application is made to the Department of Trade and Industry by a majority in number and value of the creditors who have assented to the deed for an official audit of the trustee's accounts, the Department may cause the accounts to be audited<sup>1</sup>. In that case, any rules made under the Insolvency Act 1986<sup>2</sup> relating to the institution and enforcement of an audit of the accounts of a trustee in bankruptcy, including the provisions as to fees, apply with necessary modifications to the audit of the trustee's accounts; and the Department on the audit has power to require production of a certificate for the assessed costs of any solicitor<sup>3</sup> whose costs have been paid or charged by the trustee, and to disallow the whole or any part of any costs in respect of which no certificate is produced<sup>4</sup>.

The Department may determine how and by what parties the costs, charges and expenses of and incidental to the audit, including any fees<sup>5</sup>, are to be borne, whether by the applicants or by the trustee or out of the estate, and, before granting an application for an audit, may require the applicants to give security for those costs<sup>6</sup>.

Within seven days of the Department's order being served on him, by registered post or the recorded delivery service, the trustee must deliver to the Department copies of all his previous accounts transmitted to it, together with a similar account from the date to which the last account extended to the date of the order, and an affidavit verifying the copies and account<sup>7</sup>. The audited accounts and the auditor's certificate or observations must be filed, and must be open to inspection by creditors or the trustee, who may take a copy; and a certified copy of the certificate or observations must be supplied to the trustee or any creditor on application<sup>8</sup>.

1 Deeds of Arrangement Act 1914 s 15(1) (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 2(6); the Insolvency Act 1986 s 439(2), Sch 14). For a limitation on the application of this provision see para 879 post.

2 See under the Insolvency Act 1986 s 412: see para 753 ante.

3 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

4 Deeds of Arrangement Act 1914 s 15(1).

5 For the prescribed fees see the Deeds of Arrangement Fees Order 1984, SI 1984/887, art 3, Schedule, Fees 11, 12.

6 Deeds of Arrangement Act 1914 s 15(2).

7 Deeds of Arrangement Rules 1925, SR & O 1925/795, r 29 (amended by SI 1962/297).

8 Deeds of Arrangement Rules 1925, SR & O 1925/795, r 30.

## **UPDATE**

### **877 Audit of accounts**

NOTE 3--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

NOTE 5--SI 1984/887 art 3 amended: SI 2007/3224, SI 2009/2748.

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### **878. Payment of undistributed money into court.**

At any time after the expiration of two years from the date of registration of a deed of arrangement, the court having jurisdiction<sup>1</sup> in relation to the district in which the debtor resided or carried on business at the date the deed was executed may, on the application of the trustee or a creditor, or of the debtor, order that all money representing unclaimed dividends and undistributed funds then in the trustee's hands or under his control be paid into the Supreme Court, or, if a county court has jurisdiction in the matter, into that court<sup>2</sup>.

<sup>1</sup> le under the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended). As to the courts having jurisdiction see paras 6, 7 ante.

<sup>2</sup> Deeds of Arrangement Act 1914 s 16 (amended by the Administration of Justice Act 1965 ss 17(1), 18, Sch 1; the Insolvency Act 1985 s 235(1), Sch 8 para 2(7); the Insolvency Act 1986 s 439(2), Sch 14). For a limitation on the application of this provision see para 879 post.

## **UPDATE**

### **878 Payment of undistributed money into court**

TEXT AND NOTE 2--For 'Supreme Court' read 'Senior Courts': Constitutional Reform Act 2005 Sch 11 para 4 (in force 1 October 2009: SI 2009/1604).

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### **879. Arrangement not for benefit of creditors generally.**

The provisions of the Deeds of Arrangement Act 1914 relating to trustees under deeds of arrangement<sup>1</sup>, except such of those provisions:

- 1112 (1) as relate to the transmission of accounts to the Department of Trade and Industry;
- 1113 (2) as provide for the protection of trustees under void deeds;
- 1114 (3) as require a notice to be given to creditors of avoidance of deeds;
- 1115 (4) as provide for the payment of expenses incurred by trustees,

do not apply to a deed of arrangement made for the benefit of any three or more of the debtor's creditors, unless it is in fact for the benefit of the debtor's creditors generally<sup>2</sup>.

1    Ie the Deeds of Arrangement Act 1914 Pt IV (ss 11-22) (as amended).

2    Ibid s 22. For the meaning of 'creditors generally' see para 860 note 3 ante.

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### **880. Appointment of new deed trustee.**

Whenever it is expedient to appoint a new deed trustee, and it is found inexpedient, difficult or impracticable to do so without the court's assistance, the High Court, or the court having bankruptcy jurisdiction in the district in which the debtor resided or carried on business at the date of the execution of the deed, may appoint a new trustee, either in substitution for or in addition to an existing trustee, or even where there is no existing trustee<sup>1</sup>. In particular, and without prejudice to the generality of the above provision, the court may appoint a new trustee in substitution for a trustee who is incapable by reason of mental disorder<sup>2</sup> of exercising his functions as trustee, or who is a bankrupt, or who is a corporation which is in liquidation or has been dissolved<sup>3</sup>.

If a trustee has failed to comply with the requirements as to the giving of security to administer the deed properly and account fully for the assets<sup>4</sup>, the court having bankruptcy jurisdiction in the district in which the debtor resided or carried on business at the date of the execution of the deed may, on the application of any creditor and after hearing such persons as it may think fit, appoint another trustee in place of the trustee appointed by the deed<sup>5</sup>.

Where a new trustee has been appointed, he must forthwith send the registrar<sup>6</sup> a notice of his appointment, giving his full name and address, and showing how and when the appointment was made<sup>7</sup>.

1    Trustee Act 1925 s 41(1), (2) (amended by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; the Criminal Law Act 1967 s 10(2), Sch 3 Pt I; the Mental Health Act 1983 s 148, Sch 4 para (4)). An order under the Trustee Act 1925 s 41 (as amended), and any consequential vesting order or conveyance, does not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose in any instrument would have operated: s 41(3). For the prescribed form of order declaring a deed void or appointing a new trustee see the Deeds of Arrangement Rules 1925, SR & O 1925/795, r 4(1), Appendix, Form 12. As to the appointment of a new trustee generally see TRUSTS vol 48 (2007 Reissue) para 818 et seq.

2    Ie within the meaning of the Mental Health Act 1983: see MENTAL HEALTH vol 30(2) (Reissue) para 402.

3    Trustee Act 1925 s 41(1) (as amended: see note 1 supra).

4    See para 872 ante.

5    Deeds of Arrangement Act 1914 s 11(2) (amended by the Insolvency Act 1985 Sch 8 para 2(3); the Insolvency Act 1986 Sch 14). Where an application to appoint a new trustee is made under the Deeds of Arrangement Act 1914 s 11(2) (as so amended), notice of the application must be served on the existing trustee not less than eight days before the day appointed for the hearing: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 22.

6    Ie the Registrar of Bills of Sale: see para 864 note 2 ante.

7 Deeds of Arrangement Rules 1925, SR & O 1925/795, r 27. The registrar must forthwith file the notice: r 27.

## **UPDATE**

### **880 Appointment of new deed trustee**

TEXT AND NOTES 1-3--1925 Act s 41(1) further amended, 1983 Act Sch 4 para 4 repealed: Mental Capacity Act 2005 Sch 6 para 3(3), Sch 7.

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#### **881. Power to ensure continuation of essential supplies by utilities.**

A trustee under a deed of arrangement for the benefit of an individual's creditors has the like rights as the supervisor of a voluntary arrangement, the official receiver, an interim receiver and a trustee in bankruptcy for ensuring continued supplies of gas, electricity, water and telecommunication services<sup>1</sup>.

1 See the Insolvency Act 1986 s 372 (as amended); and para 113 ante.

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#### **882. Position of trustee where deed void.**

Where a deed of arrangement is void by reason that the requisite majority of creditors have not assented thereto<sup>1</sup>, or, in the case of a deed for the benefit of three or more creditors, by reason that the debtor was insolvent at the time of the execution of the deed and that the deed was not registered as required by the Deeds of Arrangement Act 1914<sup>2</sup>, but is not void for any other reason, and a bankruptcy order<sup>3</sup> is made against the debtor on a petition presented after the lapse of three months<sup>4</sup> from the execution of the deed, the trustee under the deed is not liable to account to the trustee in the bankruptcy for any dealings with or payments made out of the debtor's property which would have been proper if the deed had been valid, if he proves that, at the time of such dealings or payments, he did not know, and had no reason to suspect, that the deed was void<sup>5</sup>.

If a trustee acts under a deed of arrangement:

1116 (1) after it has, to his knowledge, become void by reason of non-compliance with any of the requirements of the 1914 Act or any enactment repealed by that Act<sup>6</sup>; or

1117 (2) after he has failed to give security within the time and in the manner provided by the 1914 Act<sup>7</sup> or any enactment repealed by that Act<sup>8</sup>,

he is liable on summary conviction to a fine not exceeding £5 for every day between the date on which the deed became void or the expiration of the time within which security should have been given, as the case may be, and the last day on which he is proved to have acted as trustee, unless he satisfies the court that his contravention of the law was due to inadvertence, or that his action was confined to taking such steps as were necessary for the protection of the estate<sup>9</sup>.

As soon as practicable after a trustee has become aware that a deed is void by virtue of the 1914 Act for any reason other than that, being for the benefit of creditors generally, it has not been registered in time, he must give written notice to each creditor whose name and address he knows, and file a copy of the notice with the registrar; and, if he fails to do so, he is liable on summary conviction to a fine not exceeding level 2 on the standard scale<sup>10</sup>.

1 See para 865 ante.

2 See para 864 ante.

3 As to bankruptcy orders see para 195 et seq ante.

4 The period of three months has no significance under the Insolvency Act 1986 but derives from the doctrine of relation back under the Bankruptcy Act 1914 (repealed).

5 Deeds of Arrangement Act 1914 s 19(1) (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 2(8)).

6 In particular the Deeds of Arrangement Act 1887 (repealed) and the Bankruptcy and Deeds of Arrangement Act 1913 (repealed). As to the requirements of the Deeds of Arrangement Act 1914 see para 872 ante.

7 See para 872 ante.

8 See note 6 supra.

9 Deeds of Arrangement Act 1914 s 12.

10 Ibid s 20 (amended by the Criminal Justice Act 1982 s 46). For the meaning of 'the standard scale' see para 65 note 4 ante.

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### **883. Payment of trustee's expenses where deed avoided.**

Where a deed of arrangement is avoided by reason of the bankruptcy of the debtor, any expenses properly incurred<sup>1</sup> by the trustee under the deed in the performance of any of the duties imposed on him by the Deeds of Arrangement Act 1914 must be allowed or paid to him by the trustee in the bankruptcy as a first charge on the estate<sup>2</sup>. Where, however, the deed has never become effective because the necessary majority of creditors has not assented<sup>3</sup>, the trustee's expenses may be allowed only by the court, and then only if there has been real benefit to the creditors<sup>4</sup>.

1 For the meaning of 'expenses properly incurred' see *Re Green, ex p Parker* [1917] 1 KB 183.

2 Deeds of Arrangement Act 1914 s 21.

3 See para 865 ante.

4 *Re Zakon, ex p Trustee v Bushell* [1940] Ch 253, [1940] 1 All ER 263.

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#### (iv) Creditors under Arrangements

##### 884. Creditors entitled to benefit.

Where an arrangement by a debtor is expressed to be with his creditors generally, or with all creditors who assent to it, any creditor who actually, or by his conduct, assents to it and elects to take the benefit of it within the time limit for assent fixed by the instrument, is entitled to share in the benefits of the arrangement, even if he has not signed the instrument<sup>1</sup>. In the exercise of its equitable jurisdiction the court may permit a creditor who has not assented to an arrangement to come in under it and share in its benefits, notwithstanding that the time limited by the instrument for assent has elapsed<sup>2</sup>.

A creditor entitled to the benefit of an arrangement must perform fairly all the conditions of the arrangement which apply to the creditors. If he takes any step which is inconsistent with or opposed to those conditions, as, for example, by bringing an action against the debtor to recover his debt, he will be liable to be excluded from the benefit of the arrangement<sup>3</sup>. A creditor who makes any underhand or secret bargain with the debtor, by which he is to receive some payment or advantage in which the other creditors do not share, may be excluded from all the benefits of the arrangement<sup>4</sup>.

1 *Re Chambers, ex p Jerrard* (1837) 3 Deac 1 at 7; *Re Baber's Trusts* (1870) LR 10 Eq 554; *Biron v Mount* (1857) 24 Beav 642. In *Baker v Adam* (1910) 102 LT 248, it was held that the words 'according to the law of bankruptcy' in a deed of arrangement were only descriptive of a rateable payment without prejudice or priority and by a series of instalments or dividends, and did not import into the distribution of the money the obligation of allowing a set-off under the Insolvency Act 1986 s 323 (see para 535 et seq ante), to a person who had not signified his assent to the deed. In general, in a case where the deed does not incorporate the bankruptcy rules, a person having only a contingent or future claim against the debtor is not within the deed: *Re Casse* [1937] Ch 405, [1937] 2 All ER 710.

2 *Watson v Knight* (1845) 19 Beav 369; *Raworth v Parker* (1855) 2 K & J 163; *Johnson v Kershaw* (1847) 1 De G & Sm 260; *Brandling v Plummer* (1857) 27 LJ Ch 188; and cf *Re Pilet, ex p Toursier & Co and Berkeley* [1915] 3 KB 519, DC (where creditors, whose debts were provable under a previous composition and which had been discharged, were not allowed to come in under a subsequent arrangement as creditors in respect of those debts).

3 *Field v Lord Donoughmore* (1841) 1 Dr & Wal 227.

4 *Ilderton v Jewell* (1864) 16 CBNS 142; *Benham v Broadhurst* (1864) 3 H & C 472; *Wood v Barker* (1865) LR 1 Eq 139; *Re Milner, ex p Milner* (1885) 15 QBD 605, CA; *Daughlish v Tennent* (1866) LR 2 QB 49; *Re EAB* [1902] 1 KB 457. As to the consequences of a corrupt bargain see *Knight v Hunt* (1829) 5 Bing 432; *Atkinson v Denby* (1862) 7 H & N 934. For the penalty on the trustee for distributing the funds otherwise than *pari passu* see the Deeds of Arrangement Act 1914 s 17; and para 873 ante.

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### 885. Creditors bound by arrangements.

A composition agreement is binding on creditors who execute it or who expressly assent to it, or who by their conduct put themselves in the same situation as if they had executed it<sup>1</sup>; but, if a creditor's assent has been obtained by misrepresentation, he will not be bound by the agreement<sup>2</sup>.

If the debtor or some third person acting with his knowledge and on his behalf makes a secret bargain with some of the creditors, giving them an advantage over the other creditors, the arrangement will not be binding on those other creditors<sup>3</sup>, and they will not, therefore, be precluded from bringing actions or taking legal proceedings to recover the debts due to them<sup>4</sup>. Where, however, the composition agreement provides that the release contained in it is to be void if the instalments are not duly paid, a creditor who has fraudulently obtained a secret advantage over the other creditors will be bound by the agreement, and his debt will be released, even though default in payment of the instalments has been made by the debtor<sup>5</sup>.

Where there is no fraud and no inequality among creditors, the court will not interfere to judge the reasonableness of the arrangement<sup>6</sup>.

1 'The principle [is] that, if you put yourself in the situation of having the benefit of a deed, you must bear its obligations, although you have not literally executed the deed': *Forbes v Limond* (1854) 4 De GM & G 298 at 315 per Lord Cranworth LC. An assent by one branch of a company, followed by dissent by another branch, was held to bind the company in respect of all the debts due to the branches from the debtor: *Dunlop Rubber Co v WB Haigh & Son* [1937] 1 KB 347, [1936] 3 All ER 381. For an instance of a creditor's assent by conduct with consequent satisfaction of his right of action see *Victor Weston (Fabrics) Ltd v Morgensterns* [1937] 3 All ER 769, CA.

2 *Cooling v Noyes* (1795) 6 Term Rep 263; *Lewis v Jones* (1825) 4 B & C 506. In *Sier v Bullen* (1915) 84 LJKB 1288, DC, a creditor, the debtor's landlord, was told that, if he assented to a deed of arrangement, he would be paid six months' rent in addition to the dividend in respect of the balance of the rent he would take under the deed; but the other creditors did not assent to the arrangement, and there was no mention of it in the deed; it was held that the creditor had never assented to the deed, his assent being conditional on a bargain which was not enforceable, and that he was not precluded from distraining for rent owing to him.

3 *Daughlish v Tennent* (1866) LR 2 QB 49; *Re Milner, ex p Milner* (1885) 15 QBD 605, CA. As to the consequences of a corrupt bargain see *Knight v Hunt* (1829) 5 Bing 432; and para 884 ante.

4 *Re Milner, ex p Milner* (1885) 15 QBD 605, CA.

5 *Re Hodgson, ex p Oliver* (1851) 4 De G & Sm 354. As to the recovery of money paid under a secret bargain see *Atkinson v Denby* (1862) 7 H & N 934.

6 See *Re Richmond Hill Hotel Co, ex p King* (1867) 3 Ch App 10; *Bailey v Bowen* (1868) LR 3 QB 133 at 140.

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### 886. Creditors' rights and position.

A creditor may execute a deed of arrangement after its registration<sup>1</sup> without impairing its validity<sup>2</sup>; but, where creditors have attempted to defeat a deed and have failed, they may not claim to come in subsequently and execute it<sup>3</sup>.



In the event of bankruptcy supervening and the deed being thereby avoided, creditors who are parties to the deed will not be debarred from proving for their debts in the bankruptcy, unless it is clear from the terms of the deed that they intended to release their debts, whether or not bankruptcy should supervene<sup>4</sup>.

If there is a surplus in the hands of the trustee after payment of the debts and expenses, the creditors are not entitled to interest on their debts, unless the deed contains an express or implied provision for payment of interest<sup>5</sup>.

The debtor or any creditor or other person interested is entitled, on payment of the prescribed fees, to inspect the trustee's accounts and to be furnished with copies of or extracts from them<sup>6</sup>.

1 As to registration see para 866 et seq ante.

2 See *Re Batten, ex p Milne* (1889) 6 Morr 110, CA.

3 See *Re Meredith, Meredith v Facey* (1885) 33 WR 778.

4 See *Re Stephenson, ex p Official Receiver* (1888) 20 QBD 540, DC.

5 *Re Rissik* [1936] Ch 68.

6 Deeds of Arrangement Act 1914 s 13(3). For the prescribed fees see the Deeds of Arrangement Fees Order 1984, SI 1984/887, art 3, Schedule, Fees 10, 13.

## UPDATE

### 886 Creditors' rights and position

NOTE 6--SI 1984/887 art 3 amended: SI 2007/3224, SI 2009/2748.

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### 887. Rights against persons liable jointly or as sureties.

A debtor's creditors often hold rights against sureties as security for their debts, or hold securities over parts of the compounding debtor's property. If a general release in a composition deed or agreement contains also a reservation of the creditors' rights against all persons who are liable to them jointly with or as sureties for the debtor, the release operates only as an obligation not to sue the debtor, and does not operate to discharge or prejudice the creditors' rights against persons liable to them jointly with the debtor or as sureties for him<sup>1</sup>. The reservation by creditors of their rights against sureties imports the continuance of the sureties' rights of indemnity against the debtor<sup>2</sup>.

1 *Kearsley v Cole* (1846) 16 M & W 128; *Ex p Gifford* (1802) 6 Ves 805; *Bateson v Gosling* (1871) LR 7 CP 9.

2 *Cole v Lynn* [1942] 1 KB 142, [1941] 3 All ER 502, CA.

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### **888. Secured creditors' rights.**

If a composition deed or agreement reserves to creditors their rights in respect of securities held by them over the debtor's property, for example by mortgage, charge or lien, a general release contained in the deed or agreement will not prevent them from realising or dealing with and obtaining the benefit of their securities in reduction of the debts due to them<sup>1</sup>.

<sup>1</sup> *Cullingworth v Loyd* (1840) 2 Beav 385; *Mawson v Stock* (1801) 6 Ves 300. For the rules as to the rights and duties of secured creditors where the trusts of the deed provide for administration according to the rules of bankruptcy law see para 560 et seq ante.

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### **889. Deed must benefit creditors.**

Each deed must be considered as a whole, to determine whether it is what it appears to be, namely a deed for the benefit of creditors generally, rather than a deed for the debtor's benefit. If it is the latter, the deed may be declared void as being in fraud of the creditors<sup>1</sup> or being a transaction defrauding creditors<sup>2</sup> in spite of being in form a deed for the creditors' benefit<sup>3</sup>.

<sup>1</sup> In respect of deeds entered into before 29 December 1986 (see para 2 ante) see the Law of Property Act 1925 s 172(1) (repealed). An intent to defraud must be established, but whether actual deceit or dishonesty need be shown is doubtful: see *Lloyds Bank Ltd v Marcan* [1973] 3 All ER 754, [1973] 1 WLR 1387, CA.

<sup>2</sup> As regards deeds entered into on or after 29 December 1986 see the Insolvency Act 1986 ss 423-425; and para 663 et seq ante.

<sup>3</sup> See *Maskelyne and Cooke v Smith* [1903] 1 KB 671 at 676, CA per Vaughan Williams LJ; *Alton v Harrison, Poyser v Harrison* (1869) 4 Ch App 622; *Evans v Jones* (1864) 3 H & C 423; *Spencer v Slater* (1878) 4 QBD 13; *Boldero v London and Westminster Discount Co* (1879) 5 Ex D 47.

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## **(v) Enforcement; Procedure**

### **890. Enforcement of assignment.**

Any application by the trustee under a deed of arrangement, which either is expressed to be or is in fact for the benefit of the debtor's creditors generally, or by the debtor or by any creditor

entitled to the benefit of such a deed of arrangement, for the enforcement of the trusts or the determination of questions under it, must be made to the court having jurisdiction<sup>1</sup> in relation to the district in which the debtor resided or carried on business at the date of its execution<sup>2</sup>; but any question as to whether any person claiming to be a creditor entitled to the benefit of a deed of arrangement is so entitled may, subject to rules made for the purposes of the Deeds of Arrangement Act 1914<sup>3</sup>, be decided either by the court having such jurisdiction or by the High Court<sup>4</sup>.

1 le under the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended): see paras 6, 7 ante.

2 Deeds of Arrangement Act 1914 s 23 (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 2(9); the Insolvency Act 1986 s 439(2), Sch 14). An application by the debtor for a declaration that a deed of arrangement is void for non-compliance with the provisions of the 1914 Act is not an application for the enforcement of the trusts or the determination of questions 'under' it, and, therefore, a judge in a county court having bankruptcy jurisdiction has no jurisdiction to entertain such an application: *Re Wilson* [1916] 1 KB 382 at 398, CA. A trustee under a deed of arrangement for the benefit of creditors generally is entitled to obtain a declaration under the Deeds of Arrangement Act 1914 s 23 (as so amended) that certain persons named in a schedule to the deed are not in fact creditors of the assignor, notwithstanding that the trustee is himself a party to the deed: *Re Pilet, ex p Toursier & Co and Berkeley* [1915] 3 KB 519, DC.

The object of the Deeds of Arrangement Act 1914 s 23 (as so amended) is to provide a trustee or beneficiary under a deed of arrangement with a summary means of obtaining a determination of questions arising in the administration of the trusts of the deed; accordingly, a creditor who has not assented to the deed, but claims adversely to it, cannot avail himself of the summary jurisdiction contained in s 23 (as so amended): *Re Ellis* [1925] Ch 564, CA.

3 See the Deeds of Arrangement Rules 1925, SR & O 1925/795, rr 17-23; and para 891, 892 post. Power to make rules for the purposes of the Deeds of Arrangement Act 1914, other than s 7 (see para 868 ante) is contained in the Administration of Justice Act 1925 s 22(5).

4 Deeds of Arrangement Act 1914 s 23 proviso.

## UPDATE

### 890 Enforcement of assignment

NOTE 3--1925 Act s 22(5) amended: Constitutional Reform Act 2005 Sch 4 para 19(2). The Lord Chief Justice may nominate a judicial office to exercise his functions under the 1925 Act s 22(5): s 22(5A) (added by 2005 Act Sch 4 para 19(3)).

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### 891. Applications.

All applications, other than applications for rectification of the register<sup>1</sup>, which<sup>2</sup> are directed or allowed to be made to the High Court or the county court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed are deemed to be proceedings in bankruptcy and must be made in accordance with, and in the manner prescribed for, proceedings under Parts VIII to XI of the Insolvency Act 1986<sup>3</sup> and the Insolvency Rules 1986<sup>4</sup> for the time being in force, with such variations as the circumstances may require, and must be supported by affidavit<sup>5</sup>.

Applications for extension of time for procuring the assent of creditors to a deed<sup>6</sup> or for filing the prescribed statutory declaration<sup>7</sup> may be made without notice being served on any other party and without affidavit unless the court in any case otherwise orders<sup>8</sup>.

The application<sup>9</sup> must be made to the registrar of the court who must cause the same, together with the affidavits in support, to be filed, and must appoint a day for the hearing not earlier than 14 days from the filing of the application<sup>10</sup>. The registrar to whom the application is made may direct notice of the application to be served on such person or persons as he thinks fit, but, in the absence of any special direction by him, the notice, together with copies of the affidavits in support, must be served, when the application is made by the trustee, on the debtor and any creditor or other person to be affected thereby, and, when made by the debtor, on the trustee and on any creditor or other person to be affected thereby, and, when made by a creditor, on the trustee and the debtor<sup>10</sup>.

All such applications must be heard and determined by the registrar of the court in chambers; but he may in any case, and must at the request of any party thereto, adjourn the application to be heard and determined by the judge in court<sup>11</sup>.

1    Ie under the Deeds of Arrangement Act 1914 s 7: see para 868 ante.

2    Ie by the Deeds of Arrangement Act 1914 or the Deeds of Arrangement Rules 1925, SR & O 1925/795 (amended by SR & O 1941/1253; SI 1962/297; SI 1986/2001).

3    Ie the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended): see paras 6, 7 ante.

4    Ie the Insolvency Rules 1986, SI 1986/1925 (as amended).

5    Deeds of Arrangement Rules 1925, SR & O 1925/795, r 17 (amended by SI 1986/2001).

6    Ie under the Deeds of Arrangement Act 1914 s 3(1) (as amended): see para 865 ante.

7    Ie under *ibid* s 3(4): see para 865 ante.

8    Deeds of Arrangement Rules 1925, SR & O 1925/795, r 17 proviso.

9    Ie except in cases within *ibid* r 17 proviso: see *supra*. In cases within r 17 proviso the application may be made either to the registrar of the court or to a registrar of the High Court: r 18.

10    *Ibid* r 18. Notice of any application under the Deeds of Arrangement Act 1914 s 11(2) (see para 872 ante) to declare a deed void, or appoint another trustee, must be served on the trustee named in the deed not less than eight days before the day appointed for the hearing: Deeds of Arrangement Rules 1925, SR & O 1925/795, r 22.

11    *Ibid* r 21.

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## **892. Evidence.**

Unless the court otherwise orders, the evidence to be used on the application must be given by affidavit<sup>1</sup>; but any opposite party may require, by notice in writing addressed to any deponent or his solicitor<sup>2</sup>, the attendance of such deponent for cross-examination<sup>3</sup>.

All affidavits intended to be used by any party to such application, other than the applicant, must be filed in the court, and copies served on the applicant not less than four days before the day appointed for the hearing of the application<sup>4</sup>.

1 An affidavit required by or for the purposes of the Deeds of Arrangement Act 1914 may be sworn before a master of the Supreme Court or before any person empowered to take affidavits in the Supreme Court or before any other person before whom such an affidavit may, by any law for the time being in force, be sworn: s 29 (amended by the Administration of Justice Act 1925 s 29, Sch 5).

2 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

3 Deeds of Arrangement Rules 1925, SR & O 1925/795, r 19.

4 Ibid r 20.

## **UPDATE**

### **892 Evidence**

NOTE 1--For 'Supreme Court' in both places read 'Senior Courts': Constitutional Reform Act 2005 Sch 11 para 4 (in force 1 October 2009: SI 2009/1604).

NOTE 2--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

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## **(2) ADMINISTRATION ORDERS**

### **(i) In general**

#### **893. Power to make administration order.**

Where a debtor is unable to pay forthwith the amount of a judgment obtained against him, and alleges that his whole indebtedness amounts to a sum not exceeding the county court limit<sup>1</sup>, inclusive of the debt for which the judgment was obtained, a county court may make an order providing for the administration of his estate<sup>2</sup>.

Before an administration order<sup>3</sup> is made, the appropriate court<sup>4</sup> must<sup>5</sup> send to every person whose name the debtor has notified to the appropriate court as being a creditor of him a notice that that person's name has been so notified<sup>6</sup>.

An administration order may provide for the payment of the debts of the debtor by instalment or otherwise, and either in full or to such extent as appears practicable to the court under the circumstances of the case, and subject to any conditions as to his future earnings or income which the court may think just<sup>7</sup>.

1 For these purposes, 'the county court limit' means: (1) in relation to any enactment contained in the County Courts Act 1984 for which a limit is for the time being specified by an order under s 145, that limit; and

in relation to any enactment contained in the 1984 Act and not within head (1) supra, the county court limit for the time being specified by any other Order in Council or order defining the limit of county court jurisdiction for the purposes of that enactment: s 147(1). No Order in Council has been made under s 145, specifying the limit for the purposes of s 112(1)(b), (5) but, by virtue of head (2) supra, the limit of £5,000 fixed by the County Courts (Administration Order Jurisdiction) Order 1981, SI 1981/1122 art 2, applies for the purposes of these provisions. See further COURTS. An administration order is not invalid by reason only that the total amount of the debts is found at any time to exceed the county court limit, but in that case the court may, if it thinks fit, set aside the order: County Courts Act 1984 s 112(5). Section 112(5) is repealed as from such day as the Lord Chancellor may by order made by statutory instrument appoint: see the Courts and Legal Services Act 1990 ss 13(3), 124(3), 125(7), Sch 20. At the date at which this volume states the law no such day had been appointed.

2 County Courts Act 1984 s 112(1). Section 112(1) is substituted, and s 112(1A) (applications for administration orders), s 112(9) (cessation of administration orders), s 112A (further powers of the court) and s 112B (administration orders with composition provisions) are added, as from such day as the Lord Chancellor may by order made by statutory instrument appoint: see the Courts and Legal Services Act 1990 ss 13(1), (4), (5), 124(3). At the date at which this volume states the law no such day had been appointed.

3 For these purposes, 'administration order' means an order under the County Courts Act 1984 s 112 (as amended): s 112(2).

4 For these purposes, 'the appropriate court', in relation to an administration order, means the court which has the power to make the order: *ibid* s 112(2). Any powers conferred on the court by Pt VI (ss 112-117) (as amended) may be exercised by the district judge or in certain circumstances by the court officer: CPR Sch 2, CCR Ord 39 r 1. As to the functions of the court officer see para 901 note 1 post.

5 *Ie* in accordance with rules of court: see CPR Sch 2, CCR Ord 39 r 5; and para 900 post.

6 County Courts Act 1984 s 112(3) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (2)).

7 County Courts Act 1984 s 112(6). A county court administration order may be made in respect of a liability for unpaid community charge: *Preston Borough Council v Riley* [1995] BCC 700, CA.

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#### **894. Administration order on application for attachment of earnings order.**

Where, on an application to a county court for an attachment of earnings order to secure the payment of a judgment debt<sup>1</sup>, it appears to the court that the debtor<sup>2</sup> also has other debts, the court:

- 1118 (1) must consider whether the case may be one in which all the debtor's liabilities should be dealt with together and that for that purpose an administration order<sup>3</sup> should be made; and
- 1119 (2) if of opinion that it may be such a case, has power, whether or not it makes the attachment of earnings order applied for, with a view to making an administration order, to order the debtor to furnish to the court a list of all his creditors and the amounts which he owes to them respectively<sup>4</sup>.

If, on receipt of such a list, it appears to the court that the debtor's whole indebtedness amounts to not more than the amount which for the time being is the county court limit<sup>5</sup>, the court may make such an order in respect of the debtor's estate<sup>6</sup>.

However, nothing in the above provisions is to be taken as prejudicing any right of a debtor to apply<sup>7</sup> for an administration order<sup>8</sup>.

1 For these purposes, 'judgment debt' means a sum payable under: (1) a judgment or order enforceable by a court in England and Wales, not being a magistrates' court; (2) an order of a magistrates' court for the payment of money recoverable summarily as a civil debt; or (3) an order of any court which is enforceable as if it were for the payment of money so recoverable: Attachment of Earnings Act 1971 ss 2(c), 25(1).

2 For these purposes, 'the debtor', in relation to an attachment of earnings order, or to proceedings in which a court has power to make an attachment of earnings order or to proceedings arising out of such an order, means the person by whom payment is required by the relevant adjudication to be made: *ibid* ss 2(e), 25(1). 'The relevant adjudication', in relation to any payment secured or to be secured by an attachment of earnings order, means the conviction, judgment, order or other adjudication from which there arises the liability to make the payment: ss 2(d), 25(1). For the meaning of 'administration order' see note 3 *infra*.

3 For these purposes, 'administration order' means any order made under, and so referred to in, the County Courts Act 1984 Pt VI (ss 112-117) (as amended): Attachment of Earnings Act 1971 s 25(1) (amended by the County Courts Act 1984 s 148(1), Sch 2 Pt V).

4 Attachment of Earnings Act 1971 s 4(1) (amended by the Insolvency Act 1976 s 13(2)). For the prescribed form of list of creditors see the County Court (Forms) Rules 1982, SI 1982/586, r 2, Schedule, Form N93. As to the continued use of county court forms see CIVIL PROCEDURE vol 11 (2009) PARA 14.

Where a county court makes an attachment of earnings order to secure payment of a judgment debt and also, under the Attachment of Earnings Act 1971 s 4(1) (as so amended) orders the debtor to furnish to the court a list of all his creditors, sums paid to the collecting officer in compliance with the attachment of earnings order may not be dealt with by him as mentioned in s 13(1), but must be retained by him pending the decision of the court whether or not to make an administration order and must then be dealt with by him as the court may direct: s 13(3). See further COURTS.

Any powers conferred on the court by the Attachment of Earnings Act 1971 s 4 (as amended) may be exercised by the district judge or in certain circumstances by the court officer: CPR Sch 2, CCR Ord 39 r 1.

5 For the meaning of 'the county court limit' see para 893 note 1 *ante*.

6 Attachment of Earnings Act 1971 s 4(2) (amended by the County Courts Act 1984 s 148(1), Sch 2 para 40(a)). The Attachment of Earnings Act 1971 s 4(2) (so amended) is subject to the County Courts Act 1984 s 112(3) (as amended) (see para 893 *ante*) and s 112(4) (as amended) (see para 896 *post*): Attachment of Earnings Act 1971 s 4(2A) (added by the County Courts Act 1984 Sch 2 para 40(b)).

7 *Ie* under the County Courts Act 1984 s 112 (as amended): see para 893 *ante*.

8 Attachment of Earnings Act 1971 s 4(4) (amended by the County Courts Act 1984 Sch 2 para 40(c)).

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## 895. Attachment of earnings order.

Where a county court makes an administration order<sup>1</sup> in respect of a debtor's estate, it may also make an attachment of earnings order to secure the payments required by the administration order<sup>2</sup>. At any time when an administration order is in force, a county court may, with or without an application, make an attachment of earnings order to secure the payments required by the administration order, if it appears to the court that the debtor has failed to make any such payment<sup>3</sup>.

On the revocation of an administration order, any attachment of earnings order made to secure the payments required by the administration order must be discharged<sup>4</sup>.

1 For the meaning of 'administration order' see para 894 note 3 *ante*.

2 Attachment of Earnings Act 1971 s 5(1). The power of a county court under s 5 to make an attachment of earnings order to secure the payments required by an administration order includes, where the debtor is already subject to an attachment of earnings order to secure the payment of a judgment debt, power to direct that the last-mentioned order is to take effect, with or without variation under s 9 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 634), as an order to secure the payments required by the administration order: s 5(3). For the meaning of 'judgment debt' and 'the debtor' see para 894 notes 1, 2 respectively ante.

3 Ibid s 5(2).

4 CPR Sch 2, CCR Ord 39 r 16. As to revocation of an administration order see para 910 post.

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### **896. Effect of administration order.**

When an administration order<sup>1</sup> is made, no creditor has any remedy<sup>2</sup> against the person or property of the debtor in respect of any debt of which the debtor notified the appropriate court<sup>3</sup> before the administration order was made, or which has been scheduled to the order, except with the permission of the appropriate court, and on such terms as that court may impose<sup>4</sup>.

Any county court in which proceedings are pending against the debtor in respect of any debt so notified or scheduled must, on receiving notice of the administration order, stay the proceedings, but may allow costs already incurred by the creditor, and such costs may, on application, be added to the debt<sup>5</sup>. The requirement to stay proceedings does not, however, operate as a requirement that a county court in which proceedings in bankruptcy against the debtor are pending must stay those proceedings<sup>6</sup>.

So long as an administration order is in force, a creditor whose name is included in the schedule to the order is not, without the permission of the appropriate court, entitled to present, or join in, a bankruptcy petition against the debtor unless:

- 1120 (1) his name was so notified; and
- 1121 (2) the debt by virtue of which he presents, or joins in, the petition, exceeds £1,500<sup>7</sup>; and
- 1122 (3) the notice given<sup>8</sup> by the appropriate court that his name has been notified was received by the creditor within 28 days immediately preceding the day on which the petition is presented<sup>9</sup>.

1 For the meaning of 'administration order' see para 893 note 3 ante.

2 He subject to the County Courts Act 1984 s 115 (as amended) (see para 897 post) and s 116 (see para 898 post).

3 For the meaning of 'the appropriate court' see para 893 note 4 ante.

4 County Courts Act 1984 s 114(1). The object must be to secure equal division of the debtor's available property among all his creditors: *Re Frank* [1894] 1 QB 9.

5 County Courts Act 1984 s 114(2).

6 Ibid s 114(3).

7 The Secretary of State may by regulations increase or reduce the sum for the time being specified in ibid s 112(4)(b) (see text head (2) supra); but no such increase in the sum so specified affects any case in which the bankruptcy petition was presented before the coming into force of the increase: s 112(7). The power to make



such regulations is exercisable by statutory instrument; and no such regulations may be made unless a draft of them has been approved by resolution of each House of Parliament: s 112(8). At the date at which this volume states the law no such regulations had been made.

8 le under ibid s 112(3) (as amended): see para 893 ante.

9 Ibid s 112(4) (amended by the Insolvency Act 1985 s 220(1), (2)). The County Courts Act 1984 s 112(4A) is to be added after s 112(4) (as so amended) as from such day as the Lord Chancellor may by order made by statutory instrument appoint: see the Courts and Legal Services Act 1990 ss 13(2), 124(3). At the date at which this volume states the law no such day had been appointed.

An application under the County Courts Act 1984 s 112(4) (as so amended) for permission to present or join in a bankruptcy petition must be made on notice to the debtor in accordance with CPR Pt 23 (see CIVIL PROCEDURE vol 11 (2009) PARA 304 et seq); but the court may, if it thinks fit, order that notice be given to any other creditor whose debt is scheduled to the administration order: CPR Sch 2, CCR Ord 39 r 12.

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### **897. Execution by district judge.**

Where it appears to the district judge of the appropriate court<sup>1</sup> at any time while an administration order<sup>2</sup> is in force that property of the debtor exceeds in value the minimum amount<sup>3</sup>, he must, at the request of any creditor, and without fee, issue execution against the debtor's goods<sup>4</sup>.

1 For the meaning of 'the appropriate court' see para 893 note 4 ante.

2 For the meaning of 'administration order' see para 893 note 3 ante.

3 For these purposes, 'the minimum amount' means £50 or such other amount as the Lord Chancellor may by order specify instead of that amount or the amount for the time being specified in such an order; and any such order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: County Courts Act 1984 s 115(1A) (added by the Insolvency Act 1985 s 220(1), (4)). At the date at which this volume states the law no such order had been made.

4 County Courts Act 1984 s 115(1) (amended by the Insolvency Act 1985 s 220(1), (3)). The County Courts Act 1984 s 89 (as amended) (goods which may be seized: see CIVIL PROCEDURE vol 12 (2009) PARA 1315) applies on an execution under s 115 (as amended) as it applies on an execution under Pt V (ss 85-111) (as amended): s 115(2).

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### **898. Right of landlord to distrain.**

A landlord or other person to whom any rent is due from a debtor in respect of whom an administration order<sup>1</sup> is made may at any time, either before or after the date of the order, distrain on the goods or effects of the debtor for the rent due to him from the debtor, with this limitation, that, if the distress for rent is levied after the date of the order, it is available only for six months' rent accrued due prior to the date of the order and is not available for rent payable

in respect of any period subsequent to the date when the distress was levied, but the landlord or other person to whom the rent may be due from the debtor may prove under the order for the surplus due for which the distress may not have been available<sup>2</sup>.

1 For the meaning of 'administration order' see para 893 note 3 ante.

2 County Courts Act 1984 s 116.

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### **899. Appropriation of money paid.**

Money paid into court under an administration order<sup>1</sup> must be appropriated first in satisfaction of the costs of administration, which may not exceed ten pence in the pound on the total amount of the debts, and then in liquidation of debts in accordance with the order<sup>2</sup>.

1 For the meaning of 'administration order' see para 893 note 3 ante.

2 County Courts Act 1984 s 117(1).

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## **(ii) Procedure on Application**

### **900. Request by debtor for administration order; list of creditors.**

A debtor who desires to obtain an administration order<sup>1</sup> must file a request in that behalf in the court for the district in which he resides or carries on business<sup>2</sup>.

Where, on his examination<sup>3</sup> or otherwise, a debtor furnishes to the court on oath a list of his creditors and the amounts which he owes to them respectively and sufficient particulars of his resources and needs, the court may proceed as if the debtor had so filed a request<sup>4</sup>.

Where a debtor is ordered to furnish a list of creditors in connection with an attachment of earnings order<sup>5</sup>, then, unless otherwise directed, the list must be filed within 14 days after the making of the order<sup>6</sup>.

1 ie under the County Courts Act 1984 Pt VI (ss 112-117) (as amended): see para 893 et seq ante.

2 CPR Sch 2, CCR Ord 39 r 2(1). For the prescribed form of request see the County Court (Forms) Rules 1982, SI 1982/586, r 2, Schedule, Form N92 (substituted by SI 1995/2839). The statements in the request mentioned in CPR Sch 2, CCR Ord 39 r 2(1) must be verified by the debtor on oath: CPR Sch 2, CCR Ord 39 r 3. As to the continued use of county court forms see CIVIL PROCEDURE vol 11 (2009) PARA 14.

3 ie under CPR Sch 2, CCR Ord 25 r 3 (oral examination of debtor).

4 CPR Sch 2, CCR Ord 39 r 2(2).

5 le under the Attachment of Earnings Act 1971 s 4(1)(b): see para 894 head (2) ante.

6 CPR Sch 2, CCR Ord 39 r 2(3). The list mentioned in CPR Sch 2, CCR Ord 39 r 2(3) must be verified by the debtor on oath: CPR Sch 2, CCR Ord 39 r 3.

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### **901. Orders made by the court officer.**

The question whether an administration order should be made, and the terms of such an order, may be decided by the court officer<sup>1</sup> in accordance with the following provisions<sup>2</sup>.

On the filing of a request or list<sup>3</sup>, the court officer may, if he considers that the debtor's means are sufficient to discharge in full and within a reasonable period the total amount of the debts included in the list, determine the amount and frequency of the payments to be made under such an order ('the proposed rate'); and:

- 1123 (1) notify the debtor of the proposed rate requiring him to give written reasons for any objection he may have to the proposed rate within 14 days of service of notification on him;
- 1124 (2) send to each creditor mentioned in the list provided by the debtor a copy of the debtor's request or of the list together with the proposed rate;
- 1125 (3) require any such creditor to give written reasons for any objection he may have to the making of an administration order within 14 days of service of the documents mentioned in head (2) above on him<sup>4</sup>.

Objections under head (3) above may be to the making of an order, to the proposed rate or to the inclusion of a particular debt in the order<sup>4</sup>.

Where no objection under head (1) or head (3) above is received within the time stated, the court officer may make an administration order providing for payment in full of the total amount of the debts included in the list<sup>5</sup>.

Where the debtor or a creditor notifies the court of any objection within the time stated, the court officer must fix a day for a hearing at which the district judge will decide whether an administration order should be made and the court must give not less than 14 days' notice of the day so fixed to the debtor and to each creditor mentioned in the list provided by the debtor<sup>6</sup>.

Where the court officer is unable to fix a rate<sup>7</sup>, whether because he considers that the debtor's means are insufficient or otherwise, he must refer the request to the district judge<sup>8</sup>.

Where the district judge considers that he is able to do so without the attendance of the parties, he may fix the proposed rate providing for payment of the debts included in the list in full or to such extent and within such a period as appears practicable in the circumstances of the case<sup>9</sup>. Where the district judge does not so fix the proposed rate, he must direct the court officer to fix a day for a hearing at which the district judge will decide whether an administration order should be made; and the court officer must give not less than 14 days' notice of the day so fixed to the debtor and to each creditor mentioned in the list provided by the debtor<sup>10</sup>.

- 1 The court manager or such other officer of the court as the court making an administration order from time to time appoints has the conduct of the order and must take all proper steps to enforce the order or to bring to the attention of the court any matter which may make it desirable to review the order: CPR Sch 2, CCR Ord 39 r 13(1).
- 2 CPR Sch 2, CCR Ord 39 r 5(1).
- 3 *Ie* under CPR Sch 2, CCR Ord 39 r 2: see para 900 ante.
- 4 CPR Sch 2, CCR Ord 39 r 5(2).
- 5 CPR Sch 2, CCR Ord 39 r 5(3). Where an administration order is made under CPR Sch 2, CCR Ord 39 r 5(3), the court officer may exercise the power of the court under the Attachment of Earnings Act 1971 s 5 (see para 895 ante) to make an attachment of earnings order to secure the payments required by the administration order: CPR Sch 2, CCR Ord 39 r 5(9).
- 6 CPR Sch 2, CCR Ord 39 r 5(4).
- 7 *Ie* under CPR Sch 2, CCR Ord 39 r 5(2): see *supra*.
- 8 CPR Sch 2, CCR Ord 39 r 5(5).
- 9 CPR Sch 2, CCR Ord 39 r 5(6). Where the proposed rate is fixed under CPR Sch 2, CCR Ord 39 r 5(6), CPR Sch 2, CCR Ord 39 r 5(2)-(4) (see *supra*) applies with the necessary modifications as if the rate had been fixed by the court officer: CPR Sch 2, CCR Ord 39 r 5(7).
- 10 CPR Sch 2, CCR Ord 39 r 5(8). For the form of notice of hearing see county court practice form N373. As to the continued use of county court forms see CIVIL PROCEDURE vol 11 (2009) PARA 14.

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## **902. Notice of objection by creditor.**

Any creditor to whom notice has been given<sup>1</sup> of the appointment of a day for consideration whether an administration order should be made and who objects to any debt included in the list furnished by the debtor must, not less than seven days before the day of hearing, give notice of his objection, stating the grounds thereof, to the court officer<sup>2</sup>, to the debtor and to the creditor to whose debt he objects<sup>3</sup>. Except with the permission of the court, no creditor may object to a debt unless he has so given notice of his objection<sup>4</sup>.

- 1 *Ie* under CPR Sch 2, CCR Ord 39 r 5(8): see para 901 ante.
- 2 As to the functions of the court officer see para 901 note 1 ante.
- 3 CPR Sch 2, CCR Ord 39 r 6(1).
- 4 CPR Sch 2, CCR Ord 39 r 6(2).

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### 903. Procedure on day of hearing.

On the day of the hearing:

- 1126 (1) any creditor, whether or not he is mentioned in the list furnished by the debtor<sup>1</sup>, may attend and prove his debt or object<sup>2</sup> to any debt included in that list<sup>3</sup>;
- 1127 (2) every debt included in that list is to be taken to be proved unless it is objected to by a creditor or disallowed by the court or required by the court to be supported by evidence<sup>4</sup>;
- 1128 (3) any creditor whose debt is required by the court to be supported by evidence must prove his debt<sup>5</sup>;
- 1129 (4) the court may adjourn proof of any debt and, if it does so, may either adjourn consideration of the question whether an administration order should be made or proceed to determine the question, in which case, if an administration order is made, the debt, when proved, must be added to the debts scheduled to the order<sup>6</sup>;
- 1130 (5) any creditor whose debt is admitted or proved, and, with the permission of the court, any creditor the proof of whose debt has been adjourned, is entitled to be heard and to adduce evidence on the question whether an administration order should be made and, if so, in what terms<sup>7</sup>.

Where an administration order is made<sup>8</sup>, the court officer<sup>9</sup> must send a copy to:

- 1131 (a) the debtor;
- 1132 (b) every creditor whose name was included in the list furnished by the debtor;
- 1133 (c) any other creditor who has proved his debt; and
- 1134 (d) every other court in which, to the knowledge of the district judge, judgment has been obtained against the debtor or proceedings are pending in respect of any debt scheduled to the order<sup>10</sup>.

1    Ie under CPR Sch 2, CCR Ord 39 r 2: see para 900 ante.

2    Ie subject to CPR Sch 2, CCR Ord 39 r 6: see para 902 ante.

3    CPR Sch 2, CCR Ord 39 r 7(a).

4    CPR Sch 2, CCR Ord 39 r 7(b).

5    CPR Sch 2, CCR Ord 39 r 7(c).

6    CPR Sch 2, CCR Ord 39 r 7(d).

7    CPR Sch 2, CCR Ord 39 r 7(e).

8    For the prescribed form of administration order see the County Court (Forms) Order 1982, SI 1982/586, r 2, Schedule, Form N94 (substituted by SI 1993/712). As to the continued use of county court forms see CIVIL PROCEDURE VOL 11 (2009) PARA 14.

9    As to the functions of the court officer see para 901 note 1 ante.

10   CPR Sch 2, CCR Ord 39 r 9.

ADMINISTRATION ORDERS/(2) ADMINISTRATION ORDERS/(ii) Procedure on Application/904.  
Notice of order and proof of debts.

#### **904. Notice of order and proof of debts.**

Where an administration order has been made:

- 1135 (1) notice of the order must be posted in the office of the county court for the district in which the debtor resides, and must be sent to every person whose name the debtor has notified to the appropriate court<sup>1</sup> as being a creditor of his or who has proved<sup>2</sup>;
- 1136 (2) any creditor of the debtor, on proof of his debt before the district judge, is entitled to be scheduled as a creditor of the debtor for the amount of his proof<sup>3</sup>;
- 1137 (3) any creditor may object in the prescribed manner<sup>4</sup> to any debt scheduled, or to the manner in which payment is directed to be made by instalments<sup>5</sup>;
- 1138 (4) any person who, after the date of the order, becomes a creditor of the debtor must, on proof of his debt before the district judge, be scheduled as a creditor of the debtor for the amount of his proof, but is not entitled to any dividend under the order until the creditors who are scheduled as having been creditors before the date of the order have been paid to the extent provided by the order<sup>6</sup>.

1 For the meaning of 'the appropriate court' see para 893 note 4 ante.

2 County Courts Act 1984 s 113(a) (amended by the Administration of Justice Act 1985 s 67(2) Sch 8 Pt II).

3 County Courts Act 1984 s 113(b); Courts and Legal Services Act 1990 s 74(1)(a).

4 Ie under CPR Sch 2, CCR Ord 39 r 6(1); see para 902 ante.

5 County Courts Act 1984 s 113(c).

6 Ibid s 113(d); Courts and Legal Services Act 1990 s 74(1)(a). All creditors scheduled under the County Courts Act 1984 s 113(d) before an administration order is superseded under s 117(2) (see para 911 post) rank equally in proportion to the amount of their debts subject to the priority given by s 113(d) to those scheduled as having been creditors before the date of the order; but no payment made to any creditor by way of dividend or otherwise may be disturbed by reason of any subsequent proof by any creditor under s 113(d): CPR Sch 2, CCR Ord 39 r 18.

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Subsequent objection by creditor.

#### **905. Subsequent objection by creditor.**

After an administration order has been made, a creditor who has not received notice<sup>1</sup> of the appointment of a day for consideration whether an administration order should be made and who wishes to object to a debt scheduled to the order, or to the manner in which payment is directed to be made by instalments, must give notice to the court officer<sup>2</sup> of his objection and of the grounds thereof<sup>3</sup>. On receipt of such notice, the court must consider the objection and may allow it, dismiss it, or adjourn it for hearing on notice being given to such persons and on such terms as to security for costs or otherwise as the court thinks fit<sup>4</sup>. The court may<sup>5</sup> dismiss an objection if it is not satisfied that the creditor gave notice of it within a reasonable time of his becoming aware of the administration order<sup>6</sup>.

- 1 le under CPR Sch 2, CCR Ord 39 r 5: see para 901 ante.
- 2 As to the functions of the court officer see para 901 note 1 ante.
- 3 CPR Sch 2, CCR Ord 39 r 10(1).
- 4 CPR Sch 2, CCR Ord 39 r 10(2).
- 5 le without prejudice to the generality of CPR Sch 2, CCR Ord 39 r 10(2): see supra.
- 6 CPR Sch 2, CCR Ord 39 r 10(3).

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### **906. Subsequent proof by creditor.**

Any creditor whose debt is not scheduled to an administration order, and any person who after the date of the order became a creditor of the debtor, must, if he wishes to prove his debt, send particulars of his claim to the court officer<sup>1</sup>, who must give notice<sup>2</sup> of it to the debtor and to every creditor whose debt is so scheduled<sup>3</sup>.

If neither the debtor nor any creditor gives notice to the court officer, within seven days after receipt of such notice, that he objects to the claim, then, unless it is required by the court to be supported by evidence, the claim is to be taken to be proved<sup>4</sup>. If the debtor or a creditor gives notice of objection within such period of seven days or the court requires the claim to be supported by evidence, the court officer must fix a day for consideration of the claim and give notice<sup>5</sup> of it to the debtor, the creditor by whom the claim was made and the creditor, if any, making the objection, and on the hearing the court may either disallow the claim or allow it in whole or in part<sup>6</sup>. If a claim is taken to be so proved or allowed, the debt must be added to the schedule to the order and a copy of the order must then be sent to the creditor by whom the claim was made<sup>7</sup>.

- 1 As to the functions of the court officer see para 901 note 1 ante.
- 2 For the form of notice of further creditor's claim see county court practice form N375. As to the continued use of county court forms see CIVIL PROCEDURE vol 11 (2009) PARA 14.
- 3 CPR Sch 2, CCR Ord 39 r 11(1).
- 4 CPR Sch 2, CCR Ord 39 r 11(2).
- 5 For the form of notice of hearing-administration order (by direction of the court) see county court practice form N376.
- 6 CPR Sch 2, CCR Ord 39 r 11(3).
- 7 CPR Sch 2, CCR Ord 39 r 11(4).

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ADMINISTRATION ORDERS/(2) ADMINISTRATION ORDERS/(ii) Procedure on Application/907.  
Conduct of order.

### **907. Conduct of order.**

The court manager or such other officer of the court as the court making an administration order from time to time appoints has the conduct of the order and must take all proper steps to enforce the order<sup>1</sup> or to bring to the attention of the court any matter which may make it desirable to review the order<sup>2</sup>. Any creditor whose debt is scheduled to the order may<sup>3</sup>, with the permission of the court, take proceedings to enforce the order<sup>4</sup>; and the debtor or, with the permission of the court, any such creditor, may apply to the court to review the order<sup>5</sup>.

The officer having the conduct of the administration order must from time to time declare dividends and distribute them among the creditors entitled to them<sup>6</sup>; and, when a dividend is declared, notice must be sent by the officer to each of the creditors<sup>7</sup>.

A debtor who changes his residence must forthwith inform the court of his new address<sup>8</sup>; and, where the debtor becomes resident in the district of another court, the court in which the administration order is being conducted may transfer the proceedings to that other court<sup>9</sup>.

1 le including exercising the power of the court under the Attachment of Earnings Act 1971 s 5 (see para 895 ante) to make an attachment of earnings order to secure payments required by the administration order.

2 CPR Sch 2, CCR Ord 39 r 13(1). When, on a matter being brought to its attention under CPR Sch 2, CCR Ord 39 r 13(1), the court so directs or the debtor or a creditor applies for the review of an administration order, CPR Sch 2, CCR Ord 39 r 8(2) (see para 909 post) applies as if the order were subject to review under CPR Sch 2, CCR Ord 39 r 8(2); CPR Sch 2, CCR Ord 39 r 13(4).

3 le without prejudice to the County Courts Act 1984 s 115 (as amended): see para 897 ante.

4 CPR Sch 2, CCR Ord 39 r 13(2).

5 CPR Sch 2, CCR Ord 39 r 13(3). Nothing in CPR Sch 2, CCR Ord 39 r 13 requires the court officer to fix a day for a review under CPR Sch 2, CCR Ord 39 r 13A (see para 908 post): CPR Sch 2, CCR Ord 39 r 13(5).

6 CPR Sch 2, CCR Ord 39 r 17(1).

7 CPR Sch 2, CCR Ord 39 r 17(2). For the form of notice of dividend see county court practice form N377. As to the continued use of county court forms see CIVIL PROCEDURE vol 11 (2009) PARA 14.

8 CPR Sch 2, CCR Ord 39 r 19(1).

9 CPR Sch 2, CCR Ord 39 r 19(2).

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Review by court officer in default of payment.

### **908. Review by court officer in default of payment.**

Where it appears that the debtor is failing to make payments in accordance with an administration order, the court officer<sup>1</sup> must, either on his own initiative or on the application of a creditor whose debt is scheduled to the order, send a notice to the debtor informing him of the amounts which are outstanding and requiring him, within 14 days of service of the notice on him:



- 1139 (1) to make the payments as required by the order; or
- 1140 (2) to explain his reasons for failing to make the payments; and
- 1141 (3) to make a proposal for payment of the amounts outstanding; or
- 1142 (4) to make a request to vary the order<sup>2</sup>.

If the debtor does not comply with any such notice within 14 days of service, the court officer must revoke the administration order<sup>3</sup>. The court officer must refer any notice given by a debtor under heads (2), (3) or (4) above to the district judge who may:

- 1143 (a) without requiring the attendance of the parties:

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- 1. (i) revoke the administration order or vary it so as to provide for payment of the debts included in the order in full or to such extent and within such a period as appears practicable in the circumstances of the case; or
- 2. (ii) suspend the operation of the order for such time and on such terms as he thinks fit<sup>4</sup>; or

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- 1144 (b) require the court officer to fix a day for the review of the administration order and to give to the debtor and to every creditor whose debt is scheduled to the order not less than eight days' notice of the day so fixed<sup>5</sup>.

Any party affected by an order so made<sup>6</sup> may, within 14 days of service of the order on him and giving his reasons, apply on notice for the district judge to consider the matter afresh; and the court officer must fix a day for the hearing of the application before the district judge and give to the debtor and to every creditor whose debt is scheduled to the administration order not less than eight days' notice of the day so fixed<sup>7</sup>. On hearing such an application, the district judge may confirm the order or set it aside and make such new order as he thinks fit and the order so made must be entered in the records of the court<sup>8</sup>.

1 As to the functions of the court officer see para 901 note 1 ante.

2 CPR Sch 2, CCR Ord 39 r 13A(1). For the form of notice of intention to review an administration order see county court practice form N374A. As to the continued use of county court forms see CIVIL PROCEDURE vol 11 (2009) PARA 14.

3 CPR Sch 2, CCR Ord 39 r 13A(2).

4 CPR Sch 2, CCR Ord 39 r 13A(3)(a).

5 CPR Sch 2, CCR Ord 39 r 13A(3)(b).

6 ie under CPR Sch 2, CCR Ord 39 r 13A(2) or (3)(a): see supra.

7 CPR Sch 2, CCR Ord 39 r 13A(4).

8 CPR Sch 2, CCR Ord 39 r 13A(5).

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## 909. Review of order.

On making an administration order or at any subsequent time, the court may direct that the order is to be subject to review at such time or at such intervals as the court may specify<sup>1</sup>. The debtor or, with the permission of the court, any creditor whose debt is scheduled to the administration order may apply to the court to review the order<sup>2</sup>. Where the court has directed that an administration order is to be subject to review, or where the debtor or a creditor applies to the court to review the order, the court officer<sup>3</sup> must give to the debtor and to every creditor who appeared when the order was made not less than seven days' notice<sup>4</sup> of any day appointed for such review<sup>5</sup>.

On the review of an administration order, the court may:

- 1145 (1) if satisfied that the debtor is unable from any cause to pay any instalment due under the order, suspend the operation of the order for such time and on such terms as it thinks fit;
- 1146 (2) if satisfied that there has been a material change in any relevant circumstances since the order was made, vary any provision of the order<sup>6</sup>;
- 1147 (3) if satisfied that the debtor has failed without reasonable cause to comply with any provision of the order or that it is otherwise just and expedient to do so, revoke the order, either forthwith or on failure to comply with any condition specified by the court; or
- 1148 (4) make an attachment of earnings order<sup>7</sup> to secure the payments required by the administration order or vary or discharge any such attachment or earnings order already made<sup>8</sup>.

The court officer must send a copy of any order<sup>9</sup> varying or revoking an administration order to the debtor, to every creditor whose debt is scheduled to the administration order and, if the administration order is revoked, to any other court to which a copy of the administration order was<sup>10</sup> sent<sup>11</sup>.

1 CPR Sch 2, CCR Ord 39 r 8(1).

2 CPR Sch 2, CCR Ord 39 r 13(3).

3 As to the functions of the court officer see para 901 note 1 ante.

4 For the form of notice of intention to review an administration order see county court practice form N374. As to the continued use of county court forms see CIVIL PROCEDURE vol 11 (2009) PARA 14.

5 CPR Sch 2, CCR Ord 39 rr 8(2), 13(4). Nothing in CPR Sch 2, CCR Ord 39 rr 8 or 13 requires the court officer to fix a day for a review under CPR Sch 2, CCR Ord 39 r 13A (see para 908 ante): CPR Sch 2, CCR Ord 39 rr 8(3), 13(5).

6 le made by virtue of the County Courts Act 1984 s 112(6): see para 893 ante.

7 As to attachment of earnings orders see para 895 ante.

8 CPR Sch 2, CCR Ord 39 r 14(1).

9 For the prescribed form of order revoking an administration order see the County Court (Forms) Rules 1982, SI 1982/586, r 2, Schedule, Form N95 (substituted by SI 1993/712); and for the prescribed form of order suspending or varying an administration order see the County Court (Forms) Rules 1982, SI 1982/586, Schedule, Form N95A (added by SI 1993/712).

10 le pursuant to CPR Sch 2, CCR Ord 39 r 9: see para 903 ante.

11 CPR Sch 2, CCR Ord 39 r 14(2).

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## **910. Revocation of administration order.**

Where a person fails to make any payment which he is required to make by virtue of an administration order under Part VI of the County Courts Act 1984<sup>1</sup>, the court which is administering that person's estate under the order may, if it thinks fit, revoke the administration order, and make an order directing that the following provisions<sup>2</sup> and the provisions of the Company Directors Disqualification Act 1986 relating to failure to pay under a county court administration order<sup>3</sup> are to apply to that person for such period, not exceeding two years, as may be specified in the order<sup>4</sup>.

A person to whom these provisions apply may not:

- 1149 (1) either alone or jointly with another person, obtain credit<sup>5</sup> to the extent of the prescribed amount<sup>6</sup> or more; or
- 1150 (2) enter into any transaction in the course of, or for the purposes of, any business in which he is directly or indirectly engaged,

without disclosing to the person from whom he obtains the credit, or, as the case may be, with whom the transaction is entered into, the fact that these provisions apply to him<sup>7</sup>.

A person who contravenes the above provisions is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>8</sup>.

On the revocation of an administration order an attachment of earnings order<sup>9</sup> made to secure the payments required by the administration order must be discharged<sup>10</sup>.

1    Ie under the County Courts Act 1984 Pt VI (ss 112-117) (as amended): see para 893 et seq ante.

2    Ie the provisions of the Insolvency Act 1986 s 429: see infra.

3    Ie the Company Directors Disqualification Act 1986 s 12: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1119.

4    Insolvency Act 1986 s 429(1), (2).

5    Ie the amount prescribed in ibid s 360(1)(a): see para 721 note 2 ante.

6    For these purposes, the reference to a person obtaining credit includes: (1) a case where goods are bailed or hired to him under a hire-purchase agreement or agreed to be sold to him under a conditional sale agreement; and (2) a case where he is paid in advance, whether in money or otherwise, for the supply of goods or services: ibid s 429(4). For the meaning of 'hire-purchase agreement' and 'conditional sale agreement' see para 721 note 1 ante.

7    Ibid s 429(3).

8    Ibid ss 429(5), 430, Sch 10. For the meaning of 'the statutory maximum' see para 4 ante.

9    As to attachment of earnings orders see para 895 ante.

10   CPR Sch 2, CCR Ord 39 r 16.

## **UPDATE**

### **910 Revocation of administration order**

TEXT AND NOTE 4--For 'two years' read 'one year': Insolvency Act 1986 s 429(2) (amended by the Enterprise Act 2002 Sch 23 para 15).

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### **911. Discharge of administration order.**

Where money is paid into court and the amount received is sufficient to pay:

- 1151 (1) each creditor scheduled to the administration order to the extent provided by the order;
- 1152 (2) the costs of the claimant in the action in respect of which the order was made; and
- 1153 (3) the costs of the administration,

the order is superseded, and the debtor must be discharged from his debts to the scheduled creditors<sup>1</sup>.

<sup>1</sup> County Courts Act 1984 s 117(2).